CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 33 **MARCH 3, 1999** **NO. 8/9**

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DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

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U.S. Customs Service

Treasury Decisions

19 CFR Part 146

(T.D. 98–74)

RIN 1515–AB99

LAY ORDER PERIOD; GENERAL ORDER; PENALTIES; CORRECTION

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule; correction.

SUMMARY: This document makes a correction to the document published in the Federal Register that adopted as a final rule, with some changes, proposed amendments to the Customs Regulations regarding, among other things, the obligation of the owner, master, pilot, operator, or agent of an arriving carrier to provide notice to Customs and to a bonded warehouse of the presence of merchandise or baggage that has remained at the place of arrival or unlading beyond the time period provided by regulation without entry having been completed. The correction involves a conforming change to the Customs Regulations pertaining to foreign trade zones.

EFFECTIVE DATE: This correction is effective February 11, 1999.

FOR FURTHER INFORMATION CONTACT:

For legal matters: Jeremy Baskin, Penalties Branch, Office of Regulations and Rulings (202) 927–2344.

For operational matters: Steven T. Soggin, Office of Field Operations, (202) 927–0765.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On September 25 1998, Customs published in the Federal Register (63 FR 51283) T.D. 98–74 which adopted as a final rule, with some changes, proposed amendments to the Customs Regulations regarding the obligation of the owner, master, pilot, operator, or agent of an arriving carrier to provide notice to Customs and to a bonded warehouse of

the presence of merchandise or baggage that has remained at the place of arrival or unlading beyond the time period provided by the regulatory amendments (that is, the fifteenth calendar day after landing) without entry having been completed. The final regulatory texts specifically require one of the arriving carrier's obligated parties, or any party who takes custody from the arriving carrier under a Customs-authorized permit to transfer or in-bond entry, to provide notice of the unentered merchandise or baggage to Customs and to a bonded warehouse no later than 20 calendar days after landing or after receipt under the permit to transfer or after arrival at the port of destination. The notice to the bonded warehouse proprietor initiates his obligation to arrange for transportation and storage of the unentered merchandise or baggage at the risk and expense of the consignee. The final regulatory texts also provide for penalties or liquidated damages against the owner or master of any conveyance, or agent thereof, for failure to provide the required notice to Customs or to a bonded warehouse proprietor. The final regulations further provide for the assessment of liquidated damages against any party who accepts custody of the merchandise or baggage under a Customs-authorized permit to transfer or in-bond entry and who fails to notify Customs and a bonded warehouse of the presence of such unentered merchandise or baggage and also against the warehouse operator who fails to take required possession of the merchandise or baggage.

The final regulatory texts as summarized above resulted from amendments to the underlying statutory authority effected by sections 656 and 658 contained within the Customs Modernization provisions of the North American Free Trade Agreement Implementation Act (Public Law 103–182, 107 Stat. 2057) and are primarily reflected in a revised § 4.37 (19 CFR 4.37) and in new §§ 122.50 and 123.10 (19 CFR 122.50 and 123.10), each of which is entitled "[g]eneral order." (T.D. 98–74 also included a number of conforming changes to the Customs Regulations in order to reflect a number of other statutory amendments and repeals effected by the Customs Modernization provisions and in order to reflect the recent recodification and reenactment of title 49, United States Code; the correction contained in this document bears no relationship to those other regulatory amendments.)

Although T.D. 98–74 also included a number of conforming regulatory changes to ensure consistency with the terms of revised § 4.37 and new §§ 122.50 and 123.10 (involving, for example, the removal or replacement of obsolete references to a "5-day" or "lay order" period or "extension" thereof), § 146.40(c)(3) of the Customs Regulations (19 CFR 146.40(c)(3)) was overlooked in this regard. This provision concerns the treatment of general order merchandise in a foreign trade zone context. The present text, by referring to merchandise not admitted into a subzone or zone within "5 working days after its arrival there" and to an "extension of the 5 working day period," is inconsistent with, and thus could give rise to uncertainty regarding the proper and

intended applicability of, §§ 4.37, 122.50 and 123.10 in a foreign trade zone context. Therefore, T.D. 98–74 should have included an appropriate revision of § 146.40(c)(3) to clarify the operation of those general order provisions in that specific context. This document corrects this oversight.

CORRECTION OF PUBLICATION

In the document published in the Federal Register as T.D. 98–74 on September 25, 1998 (63 FR 51283), on page 51290, in the third column, the following is added after the amendment to § 127.28:

PART 146—FOREIGN TRADE ZONES

1. The authority citation for Part 146 continues to read as follows:

Authority: 19 U.S.C. 66, 81a–81u, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1623, 1624.

2. In § 146.40, paragraph (c)(3) is revised to read as follows:

§ 146.40 Operator responsibilities for direct delivery.

* * * * * * * *

(c) * * *

(3) *General order.* Merchandise not admitted into a subzone or zone site as provided in this section within 15 calendar days after its arrival there shall be disposed of in accordance with the applicable procedures in § 4.37 or § 122.50 or § 123.10 of this chapter.

* * * * * * * *

Dated: February 5, 1999.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

[Published in the Federal Register, February 11, 1999 (64 FR 6801)]

19 CFR Parts 101 and 122

(T.D. 99–9)

ESTABLISHMENT OF PORT OF ENTRY IN FORT MYERS, FLORIDA

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations pertaining to the field organization of the Customs Service by designating Fort Myers, Florida, as a port of entry. The geographical area of the new port consists of both Lee and Collier Counties in Florida, including Southwest Florida International Airport and the foreign trade zone at Immokalee Regional Airport. The change is being made as part of Customs continuing program to obtain more efficient use of its personnel, facilities, and resources, and to provide better service to carriers, importers and the general public.

EFFECTIVE DATE: March 18, 1999.

FOR FURTHER INFORMATION CONTACT: Harry Denning, Office of Field Operations, 202–927–0196.

SUPPLEMENTARY INFORMATION:

BACKGROUND

In a Notice of Proposed Rulemaking (NPRM) published in the Federal Register (63 FR 13025) on March 17, 1998, Customs proposed to amend the Customs Regulations pertaining to the field organization of the Customs Service by designating Fort Myers, Florida, as a port of entry. Customs proposed that Fort Myers be designated as a port of entry because it meets the current standards for port of entry designations set forth in T.D. 82–37, as revised by T.D. 86–14 and T.D. 87–65. The geographical boundaries of the proposed port were to be the same as those of Lee County, Florida, including Southwest Florida International Airport. It was also proposed to remove the user fee designation of Southwest Florida International Airport.

Five comments were received in response to the proposal.

ANALYSIS OF COMMENTS

Comment:

The commenters all supported the designation of Lee County including Southwest Florida International Airport as a Customs port of entry. In addition, they all requested that the port limits be expanded to include Collier County as well as Lee County.

According to the commenters, Collier County is one of the fastest growing areas in the country. Its rapid population growth is projected to

continue into the next century, with population doubling by the year 2020. Collier County is involved in international trade by virtue of its foreign trade zone at Immokalee Regional Airport, created by the Department of Commerce in 1997, and the foreign trade zone workload is projected to increase.

Response:

Customs believes that the commenters have presented sufficient information about the benefits of including Collier County in the new port to expand the geographical description of Fort Myers to include Collier County. Ample evidence has been provided to convince Customs that because Collier County is a growing county with regard to population, trade and economic structure, the economic viability of a Fort Myers port of entry will be enhanced by the inclusion of Collier County. Customs believes that the new two-county port can be efficiently managed by available Customs resources.

CONCLUSION

As part of a continuing program to obtain more efficient use of its personnel, facilities, and resources, and to provide better service to carriers, importers, and the general public, Customs is amending §§ 101.3(b)(1) and 122.15(b), Customs Regulations (19 CFR 101.3(b)(1) and 122.15(b)), by designating Fort Myers, Florida, as a port of entry and removing the designation of Southwest Florida Regional Airport as a user fee airport.

PORT LIMITS

The geographic area of the port of Fort Myers consists of Lee County, Florida, including Southwest Florida International Airport, and Collier County, Florida, including the foreign trade zone at Immokalee Regional Airport.

REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 12866

Customs establishes, expands and consolidates Customs ports of entry throughout the United States to accommodate the volume of Customs-related activity in various parts of the country. Although a notice was issued for public comment on this subject matter, because the subject matter relates to agency management and organization, it is not subject to the notice and public procedure requirements of 5 U.S.C. 553. Accordingly, this document is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Agency organization matters such as this are exempt from consideration under Executive Order 12866.

DRAFTING INFORMATION

The principal author of this document was Janet L. Johnson, Regulations Branch. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PARTS 101 AND 122

Part 101

Customs duties and inspection, Exports, Imports, Organization and functions (Government agencies).

Part 122

Administrative practice and procedure, Air carriers, Aircraft, Airports, Customs duties and inspection, Freight, Reporting and recordkeeping requirements.

AMENDMENTS TO THE REGULATIONS

For the reasons set forth above, Part 101 and Part 122 of the Customs Regulations are amended as set forth below.

PART 101—GENERAL PROVISIONS

1. The general authority citation for Part 101 and the specific authority citation for § 101.3 continue to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 2, 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1623, 1624, 1646a.

Sections 101.3 and 101.4 also issued under 19 U.S.C. 1 and 58b;

* * * * * * * * *

2. The list of ports in § 101.3(b)(1) is amended by adding, in alphabetical order under the state of Florida, "Fort Myers" in the "Ports of entry" column and "T.D. 99–9 " in the adjacent "Limits of port" column.

PART 122—AIR COMMERCE REGULATIONS

1. The general authority for Part 122 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58b, 66, 1433, 1436, 1448, 1459, 1590, 1594, 1623, 1624, 1644, 1644a.

2. The list of user fee airports in § 122.15(b) is amended by removing "Fort Myers, Florida" from the "Location" column and, on the same line, "Southwest Florida Regional Airport" from the "Name" column.

RAYMOND W. KELLY,
Commissioner of Customs.

Approved: January 15, 1999.

JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, February 16, 1999 (64 FR 7501)]

19 CFR Part 123

(T.D. 99–10)

RIN 1515–AB88

FOREIGN-BASED COMMERCIAL MOTOR VEHICLES IN INTERNATIONAL TRAFFIC

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to allow certain foreign-based commercial motor vehicles, which are admitted as instruments of international traffic, to engage in the transportation of merchandise or passengers between points in the United States where such transportation is incidental to the immediately prior or subsequent engagement of such vehicles in international traffic. Any movement of these vehicles in the general direction of an export move or as part of the return movement of the vehicles to their base country shall be considered incidental to the international movement. The benefit of this liberalization of current cabotage restrictions inures in particular to both the United States and foreign trucking industries inasmuch as it allows more efficient and economical utilization of their respective vehicles both internationally and domestically.

EFFECTIVE DATE: March 18, 1999.

FOR FURTHER INFORMATION CONTACT:

Legal aspects: Glen E. Vereb, Office of Regulations and Rulings, 202–927–2320.

Operational aspects: Eileen A. Kastava, Office of Field Operations, 202–927–0983.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to 19 U.S.C. 1322, vehicles and other instruments of international traffic shall be excepted from the application of the Customs laws to such extent and subject to such terms and conditions as may be prescribed in regulations or instructions of the Secretary of the Treasury.

This statutory mandate pertaining to foreign-based commercial motor vehicles is implemented in § 123.14 of the Customs Regulations (19 CFR 123.14). Section 123.14(a) states that to qualify as instruments of international traffic, such vehicles having their principal base of operations in a foreign country must be arriving in the United States with merchandise destined for points in the United States, or arriving empty or loaded for the purpose of taking merchandise out of the United States.

Section 123.14(c), Customs Regulations, states that with one exception, a foreign-based commercial motor vehicle, admitted as an instrument of international traffic under § 123.14(a), shall not engage in local traffic in the United States. The exception, set out in § 123.14(c)(1), states that such a vehicle, while in use on a regularly scheduled trip, may be used in local traffic that is directly incidental to the international schedule.

Section 123.14(c)(2), Customs Regulations, provides that a foreign-based truck trailer admitted as an instrument of international traffic may carry merchandise between points in the United States on the return trip as provided in § 123.12(a)(2) which allows use for such transportation as is reasonably incidental to its economical and prompt departure for a foreign country.

In regard to these cabotage restrictions, Customs received a petition from the American Trucking Association (ATA) requesting a change in Customs interpretation of its regulations governing the use of foreign-based trucks in local traffic in the United States. This petition was the culmination of joint discussions beginning in July of 1994 between the ATA and the Canadian Trucking Association (CTA) to obtain mutually agreed upon parameters with respect to the liberalization of current truck cabotage restrictions in their respective countries.

After reviewing the petition, Customs published a notice in the Customs Bulletin pursuant to 19 U.S.C. 1625(c)(1) (see 31 Cust. Bull. and Dec. No. 40, 7 (October 1, 1997)), which revised the interpretation of when a foreign-based truck would be considered as used in international traffic under existing § 123.14. However, the proposal advanced by the ATA regarding the use of a foreign-based commercial motor vehicle, including a truck, in permissible local traffic under § 123.14(c) was, of course, not addressed in the Customs Bulletin notice. To effect this change required an amendment of the regulation under the Administrative Procedure Act, 5 U.S.C. 553.

Accordingly, by a document published in the Federal Register (63 FR 27533) on May 19, 1998, Customs proposed an amendment of § 123.14(c)(1), which would allow certain foreign-based commercial motor vehicles, admitted as instruments of international traffic, to engage in the transportation of merchandise between points in the United States where such local traffic is incidental to the immediately prior or subsequent engagement of such vehicles in international traffic. In addition, this revision would eliminate the current requirement that such international traffic be regularly scheduled. Furthermore, any movement of these vehicles in the general direction of an export move or as part of the return movement of the vehicles to their base country would be considered incidental to the international movement.

In conjunction with the amendments to § 123.14, the proposed rule also included conforming amendments to § 123.16 regarding the return of the qualifying vehicles to the United States.

The benefit of this liberalization of current cabotage restrictions would inure in particular to both the United States and foreign trucking industries inasmuch as it would allow more efficient and economical utilization of their respective vehicles both internationally and domestically. Thus, while prompted by the ATA petition, which was developed in concert with the CTA, as described above, the proposed amendments would be universally applicable, and not be limited to just Canadian-based vehicles.

Discussion of Comments

A total of thirty-three comments were received from the public in response to the notice of proposed rulemaking. Thirteen commenters supported the rule as proposed, although one of these commenters urged that the rule be restricted to Canadian-based vehicles. Twenty commenters opposed the rule, with fifteen of these commenters urging Customs to change the rule, if adopted, so that it would be limited to Canada. Also, the Immigration and Naturalization Service (INS) submitted a comment which, while taking no position on the proposed rule, provided clarification as to that agency's position with regard to the use of alien commercial drivers in the U.S.

A discussion, together with Customs analysis, of the critical issues that were raised with respect to the proposed rule is set forth below.

Comment:

It was believed that the proposed expanded operation of foreign trucks in the U.S. would further encourage the employment of lower-cost foreign drivers. This would result in a significant increase in unauthorized foreign driver activity in the U.S., and induce U.S. trucking companies ultimately to pressure the INS to relax its current restrictions in this regard, thereby reducing jobs for U.S. truck drivers.

Customs Response:

Customs believes that the expanded use of foreign-based vehicles in the U.S., as proposed, will not have any impact on the existing limited scope of alien-driver activities in the U.S., as enforced by the INS. Customs will, of course, continue to defer to the INS in this matter.

To make this clear, § 123.14(c)(1) is revised to indicate that alien drivers will not be permitted to operate foreign vehicles carrying merchandise or passengers between points in the U.S., unless the drivers are in compliance with the applicable regulations of the INS.

Generally, under the existing rules of the INS, as explained in its comment on the proposed rule, a nonimmigrant alien who is driving a truck or operating another commercial motor vehicle in international traffic is admitted to the U.S. only as a visitor for business (a so-called "B–1" classification) under the Immigration and Naturalization Act (INA), as amended (8 U.S.C. 1101(a)(15)(B)).

However, while an alien who is admitted as a B–1 visitor may transport goods or passengers from a foreign country to the U.S., and may transport goods or passengers from the U.S. to a foreign country, the

alien would not be permitted to engage in point-to-point transportation of goods or passengers within the U.S. This restriction is codified in the INS regulations, specifically at 8 CFR 214.2(b)(4) which also describes the permissible scope of business activities for aliens admitted under the B–1 classification, and defines the criteria for admission of B–1 visitors pursuant to Chapter 16 of the North American Free Trade Agreement (NAFTA) (Appendix 1603.A.1 to Annex 1603 of the NAFTA).

Thus, while the subject rule allows for the use of commercial motor vehicles in the transportation of goods between points within the U.S., provided such use is incidental to the employment of those vehicles in international traffic as prescribed in § 123.14(c)(1), an alien driver or other vehicle operator seeking admission to the U.S. as a B–1 visitor for business under these circumstances would be denied admission.

In order to load and transport goods or passengers within the U.S. from one location to another (which, as noted, is outside the scope of the B–1 classification), an alien must either be a lawful permanent resident of the U.S. or must have authorization from the INS for employment in the U.S.

Comment:

One commenter thought that the adoption of the proposed amendments would have a negative competitive impact on the domestic-based commercial motor carrier industry, by affording lower-cost foreign carriers greater access to domestic freight markets.

Customs Response:

Customs does not contemplate any significant competitive impact on carriers that operate exclusively within the U.S., given the petition and strong support for the adoption of the subject rule by the American Trucking Association (ATA), which represents over 35,000 motor carriers of every type and class in the U.S. It should further be mentioned in this context that the domestic use of foreign-based commercial vehicles under the rule is strictly circumscribed by, and contingent upon, such use of the vehicles being incidental to their immediately prior or subsequent engagement in international traffic, as described in § 123.14(c)(1).

Comment:

It was urged that the proposed amendments be limited to Canadian-based vehicles. To do otherwise, it was argued, would occasion an increase in the number of unsafe and uninsured vehicles on U.S. roads. It was also emphasized here that the reciprocity in relation to truck cabotage restrictions that would result from the adoption of the proposed amendments would exist only between Canada and the U.S.

Customs Response:

Our international obligations do not permit a reciprocity requirement with regard to this matter. As such, no reciprocal agreement may be required for vehicles of any country in order to engage in local traffic

as prescribed under the subject regulatory amendments. Nevertheless, foreign-based vehicles must, of course, comply with the operating requirements imposed by the Department of Transportation and other U.S. Government agencies before being used as provided in § 123.14(c)(1).

CONCLUSION

In view of the foregoing, and following careful consideration of the comments received and further review of the matter, Customs has concluded that the proposed amendments with the modification discussed above should be adopted.

REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 12866

The final rule document greatly relaxes current cabotage restrictions for both the U.S. and foreign trucking industries, enabling more efficient and economical use of their respective vehicles both internationally and domestically. As such, under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.)*, it is certified that the rule will not have a significant economic impact on a substantial number of small entities. Nor does the rule result in a "significant regulatory action" under E.O. 12866.

LIST OF SUBJECTS IN 19 CFR PART 123

Administrative practice and procedure, Canada, Common carriers, Customs duties and inspection, Imports, International traffic, Motor carriers, Trade agreements, Vehicles.

AMENDMENTS TO THE REGULATIONS

Part 123, Customs Regulations (19 CFR part 123), is amended as set forth below.

PART 123—CUSTOMS RELATIONS WITH CANADA AND MEXICO

1. The general authority citation for part 123, and the relevant specific sectional authority citation, continue to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States (HTSUS)), 1431, 1433, 1436, 1448, 1624.

* * * * * * *

Sections 123.13–123.18 also issued under 19 U.S.C. 1322;

* * * * * * *

2. Section 123.14 is amended by revising paragraph (c)(1) to read as follows:

§ 123.14 Entry of foreign-based trucks, busses and taxicabs in international traffic.

* * * * * * *

(c) *Use in local traffic.* * * *

(1) The vehicle may carry merchandise or passengers between points in the United States if such carriage is incidental to the immediately

prior or subsequent engagement of that vehicle in international traffic. Any such carriage by the vehicle in the general direction of an export move or as part of the return of the vehicle to its base country shall be considered incidental to its engagement in international traffic. An alien driver will not be permitted to operate a vehicle under this paragraph, unless the driver is in compliance with the applicable regulations of the Immigration and Naturalization Service.

* * * * * * *

3. Section 123.16 is amended by revising paragraph (b) to read as follows:

§ 123.16 Entry of returning trucks, busses, or taxicabs in international traffic.

* * * * * * *

(b) *Use in local traffic.* Trucks, busses, and taxicabs in use in international traffic, which may include the incidental carrying of merchandise or passengers for hire between points in a foreign country, or between points in this country, shall be admitted under this section. However, such vehicles taken abroad for commercial use between points in a foreign country, otherwise than in the course of their use in international traffic, shall be considered to have been exported and must be regularly entered on return.

RAYMOND W. KELLY,
Commissioner of Customs.

Approved: January 15, 1999.
JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, February 16, 1999 (64 FR 7502)]

19 CFR Parts 24 and 178

(T.D. 99–11)

RIN 1515–AC26

AUTOMATED CLEARINGHOUSE CREDIT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document adopts as a final rule interim amendments to the Customs Regulations which provided for payments of funds to Customs by Automated Clearinghouse (ACH) credit. Under ACH credit, a payer transmits daily statement, deferred tax, and bill payments electronically through a financial institution directly to a Customs account maintained by the Department of the Treasury. ACH credit allows the payer to exercise more control over the payment process, does not require the disclosure of bank account information to Customs, and expands the types of payments that may be made through ACH.

EFFECTIVE DATE: February 16, 1999.

FOR FURTHER INFORMATION CONTACT: Ben Robbin, Financial Systems Division, Financial Management Services Center, Office of Finance, U.S. Customs Service (317–298–1520, ext. 1428).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On May 28, 1998, Customs published T.D. 98–51 in the Federal Register (63 FR 29122) setting forth interim amendments to the Customs Regulations to provide for the electronic transfer of funds to Customs for commercial transactions through the Automated Clearinghouse (ACH) credit procedure. Under ACH credit, a payer transmits daily statement, deferred tax, and bill payments electronically through a financial institution directly to a Customs account maintained by the Department of the Treasury. The ACH credit procedure offers a number of advantages when compared to the previously implemented ACH debit procedure provided for in § 24.25 of the Customs Regulations (19 CFR 24.25). These advantages include the fact that ACH credit allows the payer to exercise more control over the payment process, does not require the disclosure of bank account information to the Government, expands the types of payments that may be made through ACH, and does not require action on the part of the Government when an individual payment is effected.

The interim amendments contained in T.D. 98–51 involved (1) the addition of a new § 24.26 (19 CFR 24.26) to cover the ACH credit procedure and (2) a number of consequential wording changes in § 24.25 to

clarify when the references to ACH in that section pertain only to the ACH debit procedure and not to the ACH credit procedure of new § 24.26. These interim regulatory amendments went into effect on June 29, 1998, and the notice prescribed a public comment period which closed on July 27, 1998.

No comments were received during the prescribed public comment period. Accordingly, Customs believes that the interim regulatory amendments should be adopted as a final rule without change. This document also includes an appropriate update of the list of information collection approvals contained in § 178.2 of the Customs Regulations (19 CFR 178.2).

EXECUTIVE ORDER 12866

This document does not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.),* it is certified that the amendments will not have a significant economic impact on a substantial number of small entities. ACH credit is a voluntary payment procedure that provides increased benefits in efficiency, control, and privacy to payers who elect to make payments to Customs by electronic funds transfer. Accordingly, the amendments are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

PAPERWORK REDUCTION ACT

The collection of information contained in this final rule has been reviewed and approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1515–0218. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB.

The collection of information in this final rule is in § 24.26. This information is required in connection with an election to use the ACH credit procedure for making electronic payments of funds to Customs. The information will be used by the U.S. Customs Service to ensure that payments to Customs are properly transmitted, received, and credited. The likely respondents are business organizations including importers, exporters and manufacturers.

The estimated average annual burden associated with the collection of information in this final rule is .083 hours per respondent or recordkeeper. Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the U.S. Customs Service, Information Services Group, Office of Finance, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229, and to OMB, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, D.C. 20503.

LIST OF SUBJECTS

19 CFR Part 24

Accounting, Claims, Customs duties and inspection, Imports, Taxes.

19 CFR Part 178

Administrative practice and procedure, Reporting and recordkeeping requirements.

AMENDMENTS TO THE REGULATIONS

For the reasons stated in the preamble, under the authority of 19 U.S.C. 66 and 1624 the interim rule amending 19 CFR Part 24 which was published at 63 FR 29122 on May 28, 1998, is adopted as a final rule without change, and Part 178 of the Customs Regulations (19 CFR Part 178) is amended as set forth below.

PART 178—APPROVAL OF INFORMATION COLLECTION REQUIREMENTS

1. The authority citation for Part 178 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 1624; 44 U.S.C. 3501 *et seq.*

2. Section 178.2 is amended by adding a new listing to the table in numerical order to read as follows:

§ 178.2 Listing of OMB control numbers.

19 CFR Section	*Description*	*OMB Control No.*
* * *	* * * * *	*
§ 24.26	Automated Clearinghouse Credit.	1515–0218
* * *	* * * * *	*

RAYMOND W. KELLY,
Commissioner of Customs.

Approved: January 15, 1999.
JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, February 16, 1999 (64 FR 7500)]

(T.D. 99–12)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR JANUARY 1999

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday(s): January 18, 1999.

Austria schilling:

January 1, 1999	$0.085841
January 2, 1999	.085841
January 3, 1999	.085841
January 4, 1999	.085841
January 5, 1999	.085841
January 6, 1999	.085841
January 7, 1999	.085841
January 8, 1999	.085841
January 9, 1999	.085841
January 10, 1999	.085841
January 11, 1999	.085841
January 12, 1999	.085841
January 13, 1999	.085841
January 14, 1999	.085841
January 15, 1999	.085841
January 16, 1999	.085841
January 17, 1999	.085841
January 18, 1999	.084235
January 19, 1999	.084373
January 20, 1999	.084119
January 21, 1999	.084133
January 22, 1999	.084170
January 23, 1999	.084170
January 24, 1999	.084170
January 25, 1999	.084053
January 26, 1999	.084133
January 27, 1999	.083436
January 28, 1999	.082811
January 29, 1999	.082636
January 30, 1999	.082636
January 31, 1999	.082636

Belgium franc:

January 1, 1999	$0.029281
January 2, 1999	.029281
January 3, 1999	.029281
January 4, 1999	.029281
January 5, 1999	.029281
January 6, 1999	.029281
January 7, 1999	.029281
January 8, 1999	.029281
January 9, 1999	.029281

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for January 1999 (continued):

Belgium franc (continued):

January 10, 1999	$0.029281
January 11, 1999	.029281
January 12, 1999	.029281
January 13, 1999	.029281
January 14, 1999	.029281
January 15, 1999	.029281
January 16, 1999	.029281
January 17, 1999	.029281
January 18, 1999	.028733
January 19, 1999	.028780
January 20, 1999	.028694
January 21, 1999	.028699
January 22, 1999	.028711
January 23, 1999	.028711
January 24, 1999	.028711
January 25, 1999	.028671
January 26, 1999	.028699
January 27, 1999	.028461
January 28, 1999	.028247
January 29, 1999	.028188
January 30, 1999	.028188
January 31, 1999	.028188

Brazil real:

January 1, 1999	$0.828226
January 2, 1999	.828226
January 3, 1999	.828226
January 4, 1999	.828226
January 5, 1999	.828226
January 6, 1999	.828226
January 7, 1999	.828226
January 8, 1999	.828226
January 9, 1999	.828226
January 10, 1999	.828226
January 11, 1999	.828226
January 12, 1999	.828226
January 13, 1999	.757002
January 14, 1999	.757576
January 15, 1999	.675676
January 16, 1999	.675676
January 17, 1999	.675676
January 18, 1999	.675676
January 19, 1999	.625000
January 20, 1999	.632911
January 21, 1999	.584795
January 22, 1999	.588235
January 23, 1999	.588235
January 24, 1999	.588235
January 25, 1999	.588659
January 26, 1999	.537634
January 27, 1999	.529101
January 28, 1999	.515464
January 29, 1999	.483092
January 30, 1999	.483092
January 31, 1999	.483092

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for January 1999 (continued):

Finland markka:	
January 1, 1999	$0.198665
January 2, 1999	.198665
January 3, 1999	.198665
January 4, 1999	.198665
January 5, 1999	.198665
January 6, 1999	.198665
January 7, 1999	.198665
January 8, 1999	.198665
January 9, 1999	.198665
January 10, 1999	.198665
January 11, 1999	.198665
January 12, 1999	.198665
January 13, 1999	.198665
January 14, 1999	.198665
January 15, 1999	.198665
January 16, 1999	.198665
January 17, 1999	.198665
January 18, 1999	.194947
January 19, 1999	.195266
January 20, 1999	.194678
January 21, 1999	.194711
January 22, 1999	.194795
January 23, 1999	.184795
January 24, 1999	.194795
January 25, 1999	.194526
January 26, 1999	.194711
January 27, 1999	.193097
January 28, 1999	.191650
January 29, 1999	.191246
January 30, 1999	.191246
January 31, 1999	.191246
France franc:	
January 1, 1999	$0.180073
January 2, 1999	.180073
January 3, 1999	.180073
January 4, 1999	.180073
January 5, 1999	.180073
January 6, 1999	.180073
January 7, 1999	.180073
January 8, 1999	.180073
January 9, 1999	.180073
January 10, 1999	.180073
January 11, 1999	.180073
January 12, 1999	.180073
January 13, 1999	.180073
January 14, 1999	.180073
January 15, 1999	.180073
January 16, 1999	.180073
January 17, 1999	.180073
January 18, 1999	.176704
January 19, 1999	.176993
January 20, 1999	.176460
January 21, 1999	.176490
January 22, 1999	.176567
January 23, 1999	.176567

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for January 1999 (continued):

France franc (continued):

January 24, 1999	$0.176567
January 25, 1999	.176323
January 26, 1999	.176490
January 27, 1999	.175027
January 28, 1999	.173716
January 29, 1999	.173350
January 30, 1999	.173350
January 31, 1999	.173350

Germany deutshce mark:

January 1, 1999	$0.603938
January 2, 1999	.603938
January 3, 1999	.603938
January 4, 1999	.603938
January 5, 1999	.603938
January 6, 1999	.603938
January 7, 1999	.603938
January 8, 1999	.603938
January 9, 1999	.603938
January 10, 1999	.603938
January 11, 1999	.603938
January 12, 1999	.603938
January 13, 1999	.603938
January 14, 1999	.603938
January 15, 1999	.603938
January 16, 1999	.603938
January 17, 1999	.603938
January 18, 1999	.592638
January 19, 1999	.593610
January 20, 1999	.591820
January 21, 1999	.591923
January 22, 1999	.592178
January 23, 1999	.592178
January 24, 1999	.592178
January 25, 1999	.591360
January 26, 1999	.591923
January 27, 1999	.587014
January 28, 1999	.582617
January 29, 1999	.581390
January 30, 1999	.581390
January 31, 1999	.581390

Greece drachma:

January 1, 1999	$0.003623
January 2, 1999	.003623
January 3, 1999	.003623
January 4, 1999	.003623
January 5, 1999	.003626
January 6, 1999	.003598
January 7, 1999	.003593
January 8, 1999	.003569
January 9, 1999	.003569
January 10, 1999	.003569
January 11, 1999	.003557
January 12, 1999	.003565
January 13, 1999	.003592

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for January 1999 (continued):

Greece drachma (continued):

January 14, 1999	$0.003597
January 15, 1999	.003580
January 16, 1999	.003580
January 17, 1999	.003580
January 18, 1999	.003580
January 19, 1999	.003595
January 20, 1999	.003588
January 21, 1999	.003591
January 22, 1999	.003598
January 23, 1999	.003598
January 24, 1999	.003598
January 25, 1999	.003595
January 26, 1999	.003596
January 27, 1999	.003571
January 28, 1999	.003547
January 29, 1999	.003543
January 30, 1999	.003543
January 31, 1999	.003543

Ireland pound:

January 1, 1999	$1.499800
January 2, 1999	1.499800
January 3, 1999	1.499800
January 4, 1999	1.499800
January 5, 1999	1.499800
January 6, 1999	1.499800
January 7, 1999	1.499800
January 8, 1999	1.499800
January 9, 1999	1.499800
January 10, 1999	1.499800
January 11, 1999	1.499800
January 12, 1999	1.499800
January 13, 1999	1.499800
January 14, 1999	1.499800
January 15, 1999	1.499800
January 16, 1999	1.499800
January 17, 1999	1.499800
January 18, 1999	1.471753
January 19, 1999	1.474166
January 20, 1999	1.469722
January 21, 1999	1.469976
January 22, 1999	1.470611
January 23, 1999	1.470611
January 24, 1999	1.470611
January 25, 1999	1.468579
January 26, 1999	1.469976
January 27, 1999	1.457786
January 28, 1999	1.446867
January 29, 1999	1.443819
January 30, 1999	1.443819
January 31, 1999	1.443819

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for January 1999 (continued):

Italy lira:

January 1, 1999	$0.000610
January 2, 1999	.000610
January 3, 1999	.000610
January 4, 1999	.000610
January 5, 1999	.000610
January 6, 1999	.000610
January 7, 1999	.000610
January 8, 1999	.000610
January 9, 1999	.000610
January 10, 1999	.000610
January 11, 1999	.000610
January 12, 1999	.000610
January 13, 1999	.000610
January 14, 1999	.000610
January 15, 1999	.000610
January 16, 1999	.000610
January 17, 1999	.000610
January 18, 1999	.000599
January 19, 1999	.000600
January 20, 1999	.000598
January 21, 1999	.000598
January 22, 1999	.000598
January 23, 1999	.000598
January 24, 1999	.000598
January 25, 1999	.000597
January 26, 1999	.000598
January 27, 1999	.000593
January 28, 1999	.000589
January 29, 1999	.000587
January 30, 1999	.000587
January 31, 1999	.000587

Luxembourg franc:

January 1, 1999	$0.029281
January 2, 1999	.029281
January 3, 1999	.029281
January 4, 1999	.029281
January 5, 1999	.029152
January 6, 1999	.028845
January 7, 1999	.028934
January 8, 1999	.028642
January 9, 1999	.028642
January 10, 1999	.028642
January 11, 1999	.028592
January 12, 1999	.028627
January 13, 1999	.028999
January 14, 1999	.028976
January 15, 1999	.028733
January 16, 1999	.028733
January 17, 1999	.028733
January 18, 1999	.028733
January 19, 1999	.028780
January 20, 1999	.028694
January 21, 1999	.028699
January 22, 1999	.028711
January 23, 1999	.028711

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for January 1999 (continued):

Luxembourg franc (continued):

January 24, 1999	$0.028711
January 25, 1999	.028671
January 26, 1999	.028699
January 27, 1999	.028461
January 28, 1999	.028247
January 29, 1999	.028188
January 30, 1999	.028188
January 31, 1999	.028188

Netherlands guilder:

January 1, 1999	$0.535992
January 2, 1999	.535992
January 3, 1999	.535992
January 4, 1999	.535992
January 5, 1999	.535992
January 6, 1999	.535992
January 7, 1999	.535992
January 8, 1999	.535992
January 9, 1999	.535992
January 10, 1999	.535992
January 11, 1999	.535992
January 12, 1999	.535992
January 13, 1999	.535992
January 14, 1999	.535992
January 15, 1999	.535992
January 16, 1999	.535992
January 17, 1999	.535992
January 18, 1999	.525977
January 19, 1999	.526839
January 20, 1999	.525251
January 21, 1999	.525341
January 22, 1999	.525568
January 23, 1999	.525568
January 24, 1999	.525568
January 25, 1999	.524842
January 26, 1999	.525341
January 27, 1999	.520985
January 28, 1999	.517083
January 29, 1999	.515993
January 30, 1999	.515993
January 31, 1999	.515993

Portugal escudo:

January 1, 1999	$0.005892
January 2, 1999	.005892
January 3, 1999	.005892
January 4, 1999	.005892
January 5, 1999	.005892
January 6, 1999	.005892
January 7, 1999	.005892
January 8, 1999	.005892
January 9, 1999	.005892
January 10, 1999	.005892
January 11, 1999	.005892
January 12, 1999	.005892
January 13, 1999	.005892

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for January 1999 (continued):

Portugal escudo (continued):

January 14, 1999	$0.005892
January 15, 1999	.005892
January 16, 1999	.005892
January 17, 1999	.005892
January 18, 1999	.005782
January 19, 1999	.005791
January 20, 1999	.005774
January 21, 1999	.005775
January 22, 1999	.005777
January 23, 1999	.005777
January 24, 1999	.005777
January 25, 1999	.005769
January 26, 1999	.005775
January 27, 1999	.005727
January 28, 1999	.005684
January 29, 1999	.005672
January 30, 1999	.005672
January 31, 1999	.005672

South Korea won:

January 1, 1999	$0.000842
January 2, 1999	.000842
January 3, 1999	.000842
January 4, 1999	.000842
January 5, 1999	.000858
January 6, 1999	.000862
January 7, 1999	.000869
January 8, 1999	.000852
January 9, 1999	.000852
January 10, 1999	.000852
January 11, 1999	.000851
January 12, 1999	.000847
January 13, 1999	.000851
January 14, 1999	.000842
January 15, 1999	.000844
January 16, 1999	.000844
January 17, 1999	.000844
January 18, 1999	.000844
January 19, 1999	.000850
January 20, 1999	.000856
January 21, 1999	.000852
January 22, 1999	.000847
January 23, 1999	.000847
January 24, 1999	.000847
January 25, 1999	.000847
January 26, 1999	.000850
January 27, 1999	.000850
January 28, 1999	.000850
January 29, 1999	.000850
January 30, 1999	.000850
January 31, 1999	.000850

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for January 1999 (continued):

Spain peseta:

January 1, 1999	$0.007099
January 2, 1999	.007099
January 3, 1999	.007099
January 4, 1999	.007099
January 5, 1999	.007099
January 6, 1999	.007099
January 7, 1999	.007099
January 8, 1999	.007099
January 9, 1999	.007099
January 10, 1999	.007099
January 11, 1999	.007099
January 12, 1999	.007099
January 13, 1999	.007099
January 14, 1999	.007099
January 15, 1999	.007099
January 16, 1999	.007099
January 17, 1999	.007099
January 18, 1999	.006966
January 19, 1999	.006978
January 20, 1999	.006957
January 21, 1999	.006958
January 22, 1999	.006961
January 23, 1999	.006961
January 24, 1999	.006961
January 25, 1999	.006951
January 26, 1999	.006958
January 27, 1999	.006900
January 28, 1999	.006849
January 29, 1999	.006834
January 30, 1999	.006834
January 31, 1999	.006834

Taiwan N.T. dollar:

January 1, 1999	$0.031124
January 2, 1999	.031124
January 3, 1999	.031124
January 4, 1999	.031124
January 5, 1999	.031008
January 6, 1999	.031008
January 7, 1999	.031124
January 8, 1999	.031037
January 9, 1999	.031037
January 10, 1999	.031037
January 11, 1999	.031056
January 12, 1999	.030998
January 13, 1999	.031027
January 14, 1999	.030931
January 15, 1999	.030998
January 16, 1999	.030998
January 17, 1999	.030998
January 18, 1999	.030998
January 19, 1999	.030864
January 20, 1999	.030960
January 21, 1999	.030950
January 22, 1999	.030912
January 23, 1999	.030912

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for January 1999 (continued):

Taiwan N.T. dollar (continued):

January 24, 1999	$0.030912
January 25, 1999	.030769
January 26, 1999	.030769
January 27, 1999	.030902
January 28, 1999	.030883
January 29, 1999	.030921
January 30, 1999	.030921
January 31, 1999	.030921

Dated: February 17, 1999.

RICHARD B. LAMAN,
Chief,
Customs Information Exchange.

(T.D. 99–13)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATES FOR JANUARY 1999

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rates published in Treasury Decision 99–5 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Holiday(s): January 19, 1999.

Austria schilling:

January 18, 1999	$0.084235
January 19, 1999	.084373
January 20, 1999	.084119
January 21, 1999	.084133
January 22, 1999	.084170
January 23, 1999	.084170
January 24, 1999	.084170
January 25, 1999	.084053
January 26, 1999	.084133
January 27, 1999	.083436
January 28, 1999	.082811
January 29, 1999	.082636
January 30, 1999	.082636
January 31, 1999	.082636

FOREIGN CURRENCIES—Variances from quarterly rates for January 1999 (continued):

Belgium franc:

January 18, 1999	$0.028733
January 19, 1999	.028780
January 20, 1999	.028694
January 21, 1999	.028699
January 22, 1999	.028711
January 23, 1999	.028711
January 24, 1999	.028711
January 25, 1999	.028671
January 26, 1999	.028699
January 27, 1999	.028461
January 28, 1999	.028247
January 29, 1999	.028188
January 30, 1999	.028188
January 31, 1999	.028188

Brazil real:

January 13, 1999	$0.757002
January 14, 1999	.757576
January 15, 1999	.675676
January 16, 1999	.675676
January 17, 1999	.675676
January 18, 1999	.675676
January 19, 1999	.625000
January 20, 1999	.632911
January 21, 1999	.584795
January 22, 1999	.588235
January 23, 1999	.588235
January 24, 1999	.588235
January 25, 1999	.558659
January 26, 1999	.537634
January 27, 1999	.529101
January 28, 1999	.515464
January 29, 1999	.483092
January 30, 1999	.483092
January 31, 1999	.483092

Finland markka:

January 18, 1999	$0.194947
January 19, 1999	.195266
January 20, 1999	.194678
January 21, 1999	.194711
January 22, 1999	.194795
January 23, 1999	.194795
January 24, 1999	.194795
January 25, 1999	.194526
January 26, 1999	.194711
January 27, 1999	.193097
January 28, 1999	.191650
January 29, 1999	.191246
January 30, 1999	.191246
January 31, 1999	.191246

FOREIGN CURRENCIES—Variances from quarterly rates for January 1999 (continued):

France franc:

January 18, 1999	$0.176704
January 19, 1999	.176993
January 20, 1999	.176460
January 21, 1999	.176490
January 22, 1999	.176567
January 23, 1999	.176567
January 24, 1999	.176567
January 25, 1999	.176323
January 26, 1999	.176490
January 27, 1999	.175027
January 28, 1999	.173716
January 29, 1999	.173350
January 30, 1999	.173350
January 31, 1999	.173350

Germany deutsche mark:

January 18, 1999	$0.592638
January 19, 1999	.593610
January 20, 1999	.591820
January 21, 1999	.591923
January 22, 1999	.592178
January 23, 1999	.592178
January 24, 1999	.592178
January 25, 1999	.591360
January 26, 1999	.591923
January 27, 1999	.587014
January 28, 1999	.582617
January 29, 1999	.581390
January 30, 1999	.581390
January 31, 1999	.581390

Greece drachma:

January 1, 1999	$0.003623
January 2, 1999	.003623
January 3, 1999	.003623
January 4, 1999	.003623
January 5, 1999	.003626
January 6, 1999	.003598
January 7, 1999	.003593
January 8, 1999	.003569
January 9, 1999	.003569
January 10, 1999	.003569
January 11, 1999	.003557
January 12, 1999	.003565
January 13, 1999	.003592
January 14, 1999	.003597
January 15, 1999	.003580
January 16, 1999	.003580
January 17, 1999	.003580
January 18, 1999	.003580
January 19, 1999	.003595
January 20, 1999	.003588
January 21, 1999	.003591
January 22, 1999	.003598
January 23, 1999	.003598
January 24, 1999	.003598

FOREIGN CURRENCIES—Variances from quarterly rates for January 1999 (continued):

Greece drachma (continued):

January 25, 1999	$0.003595
January 26, 1999	.003596
January 27, 1999	.003571
January 28, 1999	.003547
January 29, 1999	.003543
January 30, 1999	.003543
January 31, 1999	.003543

Ireland pound:

January 18, 1999	$1.471753
January 19, 1999	1.474166
January 20, 1999	1.469722
January 21, 1999	1.469976
January 22, 1999	1.470611
January 23, 1999	1.470611
January 24, 1999	1.470611
January 25, 1999	1.468579
January 26, 1999	1.469976
January 27, 1999	1.457786
January 28, 1999	1.446867
January 29, 1999	1.443819
January 30, 1999	1.443819
January 31, 1999	1.434819

Italy lira:

January 18, 1999	$0.000599
January 19, 1999	.000600
January 20, 1999	.000598
January 21, 1999	.000598
January 22, 1999	.000598
January 23, 1999	.000598
January 24, 1999	.000598
January 25, 1999	.000597
January 26, 1999	.000598
January 27, 1999	.000593
January 28, 1999	.000589
January 29, 1999	.000587
January 30, 1999	.000587
January 31, 1999	.000587

Luxembourg franc:

January 1, 1999	$0.029281
January 2, 1999	.029281
January 3, 1999	.029281
January 4, 1999	.029281
January 5, 1999	.029152
January 6, 1999	.028845
January 7, 1999	.028934
January 8, 1999	.028642
January 9, 1999	.028642
January 10, 1999	.028642
January 11, 1999	.028592
January 12, 1999	.028627
January 13, 1999	.028999
January 14, 1999	.028976
January 15, 1999	.028733

FOREIGN CURRENCIES—Variances from quarterly rates for January 1999 (continued):

Luxembourg franc (continued):

January 16, 1999	$.028733
January 17, 1999	.028733
January 18, 1999	.028733
January 19, 1999	.028780
January 20, 1999	.028694
January 21, 1999	.028699
January 22, 1999	.028711
January 23, 1999	.028711
January 24, 1999	.028711
January 25, 1999	.028671
January 26, 1999	.028699
January 27, 1999	.028461
January 28, 1999	.028247
January 29, 1999	.028188
January 30, 1999	.028188
January 31, 1999	.028188

Mexico peso:

January 13, 1999	$0.094340
January 14, 1999	.094967

Netherlands guilder:

January 18, 1999	$0.525977
January 19, 1999	.526839
January 20, 1999	.525251
January 21, 1999	.525341
January 22, 1999	.525568
January 23, 1999	.525568
January 24, 1999	.525568
January 25, 1999	.524842
January 26, 1999	.525341
January 27, 1999	.520985
January 28, 1999	.517083
January 29, 1999	.515993
January 30, 1999	.515993
January 31, 1999	.515993

Portugal escudo:

January 18, 1999	$0.005782
January 19, 1999	.005791
January 20, 1999	.005774
January 21, 1999	.005775
January 22, 1999	.005777
January 23, 1999	.005777
January 24, 1999	.005777
January 25, 1999	.005769
January 26, 1999	.005775
January 27, 1999	.005727
January 28, 1999	.005684
January 29, 1999	.005672
January 30, 1999	.005672
January 31, 1999	.005672

South Africa, Republic of, rand:

January 14, 1999	$0.160256

FOREIGN CURRENCIES—Variances from quarterly rates for January 1999 (continued):

South Korea won:

January 1, 1999	$0.000842
January 2, 1999	.000842
January 3, 1999	.000842
January 4, 1999	.000842
January 5, 1999	.000858
January 6, 1999	.000862
January 7, 1999	.000869
January 8, 1999	.000852
January 9, 1999	.000852
January 10, 1999	.000852
January 11, 1999	.000851
January 12, 1999	.000847
January 13, 1999	.000851
January 14, 1999	.000842
January 15, 1999	.000844
January 16, 1999	.000844
January 17, 1999	.000844
January 18, 1999	.000844
January 19, 1999	.000850
January 20, 1999	.000856
January 21, 1999	.000852
January 22, 1999	.000847
January 23, 1999	.000847
January 24, 1999	.000847
January 25, 1999	.000847
January 26, 1999	.000850
January 27, 1999	.000850
January 28, 1999	.000850
January 29. 1999	.000850
January 30, 1999	.000850
January 31, 1999	.000850

Spain peseta:

January 18, 1999	$0.006966
January 19, 1999	.006978
January 20, 1999	.006957
January 21, 1999	.006958
January 22, 1999	.006961
January 23, 1999	.006961
January 24, 1999	.006961
January 25, 1999	.006951
January 26, 1999	.006958
January 27, 1999	.006900
January 28, 1999	.006849
January 29, 1999	.006834
January 30, 1999	.006834
January 31, 1999	.006834

Taiwan N.T. dollar:

January 1, 1999	$0.031124
January 2, 1999	.031124
January 3, 1999	.031124
January 4, 1999	.031124
January 5, 1999	.031008
January 6, 1999	.031008
January 7, 1999	.031124

FOREIGN CURRENCIES—Variances from quarterly rates for January 1999 (continued):

Taiwan N.T. dollar (continued):

January 8, 1999	$0.031037
January 9, 1999	.031037
January 10, 1999	.031037
January 11, 1999	.031056
January 12, 1999	.030998
January 13, 1999	.031027
January 14, 1999	.030931
January 15, 1999	.030998
January 16, 1999	.030998
January 17, 1999	.030998
January 18, 1999	.030998
January 19, 1999	.030864
January 20, 1999	.030960
January 21, 1999	.030950
January 22, 1999	.030912
January 23, 1999	.030912
January 24, 1999	.030912
January 25, 1999	.030769
January 26, 1999	.030769
January 27, 1999	.030902
January 28, 1999	.030883
January 29, 1999	.030921
January 30, 1999	.030921
January 31, 1999	.030921

Dated: February 17, 199.

RICHARD B. LAMAN,
Chief,
Customs Information Exchange.

U.S. Customs Service

General Notices

QUARTERLY IRS INTEREST RATES USED IN CALCULATING INTEREST ON OVERDUE ACCOUNTS AND REFUNDS ON CUSTOMS DUTIES

AGENCY: Customs Service, Treasury.

ACTION: General notice.

SUMMARY: This notice advises the public of the quarterly Internal Revenue Service interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of Customs duties. Due to recent legislation, the interest rate applicable to overpayments by corporations is now different than the interest rate for overpayments by non-corporations. For the quarter beginning January 1, 1999, the interest rates for overpayments will be 6 percent for corporations and 7 percent for non-corporations, and the interest rate for underpayments will be 7 percent. This notice is published for the convenience of the importing public and Customs personnel.

EFFECTIVE DATE: January 1, 1999.

FOR FURTHER INFORMATION CONTACT: Ronald Wyman, Accounting Services Division, Accounts Receivable Group, 6026 Lakeside Boulevard, Indianapolis, Indiana 46278, (317) 298–1200, extension 1349.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to 19 U.S.C. 1505 and Treasury Decision 85–93, published in the Federal Register on May 29, 1985 (50 FR 21832), the interest rate paid on applicable overpayments or underpayments of Customs duties shall be in accordance with the Internal Revenue Code rate established under 26 U.S.C. 6621 and 6622. Section 6621 was recently amended (at paragraph (a)(1)(B) by the Internal Revenue Service Restructuring and Reform Act of 1998, Pub.L. 105–206, 112 Stat. 685) to provide different interest rates applicable to overpayments: one for corporations and one for non-corporations. The interest rate applicable to underpayments is not so bifurcated.

The interest rates are based on the short-term Federal rate and determined by the Internal Revenue Service (IRS) on behalf of the Secretary of the Treasury on a quarterly basis. The rates effective for a quarter are determined during the first-month period of the previous quarter.

In Revenue Ruling 98–61 *(see,* 1998–51 IRB, dated December 21, 1998), the IRS determined the rates of interest for the second quarter of fiscal year (FY) 1999 (the period of January 1—March 31, 1999). The interest rate paid to the Treasury for underpayments will be the short-term Federal rate (4%) plus three percentage points (3%) for a total of seven percent (7%). For corporate overpayments, the rate is the Federal short-term rate (4%) plus two percentage points (2%) for a total of six percent (6%). For overpayments made by non-corporations, the rate is the Federal short-term rate (4%) plus three percentage points (3%) for a total of seven percent (7%). These interest rates are subject to change for the third quarter of FY–1999 (the period of April 1—June 30, 1999).

For the convenience of the importing public and Customs personnel the following list of Internal Revenue Service interest rates used, covering the period from before July of 1974 to date, to calculate interest on overdue accounts and refunds of Customs duties, is published in summary format.

Beginning Date	*Ending Date*	*Under-payments*	*Over-payments*	*Corporate over-payments (Eff. 1–1–99)*
Prior to				
070174	063075	6 %	6 %	
070175	013176	9 %	9 %	
020176	013178	7 %	7 %	
020178	013180	6 %	6 %	
020180	013182	12 %	12 %	
020182	123182	20 %	20 %	
010183	063083	16 %	16 %	
070183	123184	11 %	11 %	
010185	063085	13 %	13 %	
070185	123185	11 %	11 %	
010186	063086	10 %	10 %	
070186	123186	9 %	9 %	
010187	093087	9 %	8 %	
100187	123187	10 %	9 %	
010188	033188	11 %	10 %	
040188	093088	10 %	9 %	
100188	033189	11 %	10 %	
040189	093089	12 %	11 %	
100189	033191	11 %	10 %	
040191	123191	10 %	9 %	
010192	033192	9 %	8 %	
040192	093092	8 %	7 %	
100192	063094	7 %	6 %	
070194	093094	8 %	7 %	
100194	033195	9 %	8 %	
040195	063095	10 %	9 %	

Beginning Date	*Ending Date*	*Under-payments*	*Over-payments*	*Corporate over-payments (Eff. 1–1–99)*
070195	033196	9 %	8 %	
040196	063096	8 %	7 %	
070196	033198	9 %	8 %	
040198	123198	8 %	7 %	
010199	033199	7 %	7 %	6 %

Dated: February 10, 1999.

RAYMOND W. KELLY,
Commissioner of Customs.

[Published in the Federal Register, February 16, 1999 (64 RR 7692)]

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, February 10, 1999.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

PROPOSED REVOCATION OF A RULING LETTER PERTAINING TO THE CLASSIFICATION OF HANDBAGS WITH BRAIDED LEATHER STRAPS

AGENCY: U.S. Customs Service, Department of Treasury.

ACTION: Notice of proposed revocation of a tariff classification ruling letter

SUMMARY: Pursuant to section 625(c)(1) of the Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of handbags with braided leather straps.

DATE: Comments must be received on or before April 2, 1999.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, NW (Ronald Reagan Building), Washington, D.C. 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at the same address.

FOR FURTHER INFORMATION CONTACT: Rebecca A. Hollaway, Tariff Classification Appeals Division (202) 927–2379.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1) of the Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Moderniza-

tion) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke New York Ruling Letter (NY) D82380, dated September 29, 1998, pertaining to the tariff classification of handbags with braided leather straps.

In NY D82380, Customs classified two handbags under subheading 4202.22.8050 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for handbags, whether or not with shoulder strap, including those without handle, with outer surface of textile materials, other, of man-made fibers. That ruling is set forth as "Attachment A" to this document. The correct classification of the bags is under subheading 4202.22.4040, HTSUSA, which provides for handbags, with outer surface of textile materials, wholly or in part of braid, other.

Before taking this action, we will give consideration to any written comments timely received. Proposed Headquarters Ruling Letter (HQ) 962357 revoking NY D82380 is set forth as "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.0), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: February 4, 1999.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
New York, NY, September 29, 1998.

CLA–2–42:RR:NC:TA:341 D82380
Category: Classification
Tariff No. 4202.22.8050

MR. STEVEN S. WEISER, ESQ.
GRAHAM & JAMES LLP
885 Third Ave., 24th FL
New York, NY 10022–4834

Re: The tariff classification of handbags from China.

DEAR MR. WEISER:

In your letter dated September 10, 1998, on behalf of Liz Claiborne, Inc., you requested a classification ruling for handbags.

The samples submitted, identified as styles DH840089 and DH840096, are handbags manufactured with an exterior surface of man-made textile materials. Subheading 4202.22. provides for Handbags, with or without handles or shoulder straps. The shoulder

straps herein are "de minimis". Style DH840089 measures approximately 6½" (H) x 7" (W) with 2½" gussets. Style DH840096 measures approximately 9" (H) x 11" (W) with 3" gussets. Both styles are secured by means of magnetic snap fasteners. Your samples are being returned as you requested.

The applicable subheading for Styles DH840089 and DH84096, the handbags of man-made textile materials, will be 4202.22.8050, Harmonized Tariff Schedule of the United States (HTS), which provides for handbags, whether or not with shoulder strap, including those without handle, with outer surface of textile materials, other, of man-made fibers. The duty rate will be 19 percent ad valorem.

The handbags fall within textile category designation 670. Based upon international textile trade agreements products of China are subject to quota and the requirement of a visa.

The designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes. To obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Kevin Gorman at 212–466–5893.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:TE 962357 RH
Category: Classification
Tariff No. 4202.22.4030

GRAHAM & JAMES LLP
885 Third Avenue, 24th floor
New York, NY 10022–4834

Re: Reconsideration of NY D82380, dated September 29, 1998; Classification of handbags with braided leather straps; heading 4202.

DEAR GENTLEMEN:

This is in reply to your letter of November 6, 1998, requesting reconsideration of New York Ruling Letter (NY) D82380, dated September 29, 1998, concerning the classification of two textile handbags with braided leather straps.

You sent samples of each bag to aid us in our determination.

Initially, we note that your request for expedited treatment under 19 U.S.C. § 1625 is denied. A ruling request based on an undesirable duty rate does not establish reasonable business necessity.

Facts:

The merchandise at issue consists of two textile handbags with permanently attached braided leather straps. A description of the merchandise in NY D82380 reads:

> The samples submitted, identified as styles DH840089 and DH840096, are handbags manufactured with an exterior surface of man-made textile materials. Subheading 4202.22. provides for Handbags, with or without handles or shoulder straps. The

shoulder straps herein are "de minimis". Style DH840089 measures approximately 6½" (H) x 7" (W) with 2½" gussets. Style DH840096 measures approximately 9" (H) x 11" (W) with 3" gussets.

In NY D82380, Customs classified both handbags under subheading 4202.22.8050 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for handbags, whether or not with shoulder strap, including those without handle, with outer surface of textile materials, other, of man-made fibers. You argue that Customs should have classified the handbags under subheading 4202.22.40, HTSUSA, which provides for handbags, with outer surface of textile materials: wholly or in part of braid, other.

Issue:

What is the proper classification of handbags with braided leather straps under the HTSUSA?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's taken in order.

It is undisputed that the handbags are classifiable under subheading 4202.22, HTSUSA, which encompasses handbags, with outer surface of textile materials. At the 8-digit level, we must determine if the bags are classifiable as "wholly of" or "in part of" braid.

General Note (GN) 19(e), HTSUSA, reads as follows:

> (e) the terms "wholly of", "in part of", and "containing", when used between the description of an article and a material (e.g., "woven fabrics, wholly of cotton"), have the following meanings:
>
> (i) "wholly of" means that the goods are, except for negligible or insignificant quantities of some other material or materials, composed completely of the named material;
>
> (ii) "in part of" or "containing" mean that the goods contain a significant quantity of the named material.
>
> With regard to the application of the quantitative concepts specified above, it is intended that the de *minimis* rule apply.

The de *minimis* rule states that an ingredient or component of an article may be ignored for classification purposes depending upon "whether or not the amount used has really changed or affected the nature of the article and, of course, its salability." *Varsity Watch Company v. United States*, 34 CCPA 155, C.A.D. 359 (1947).

You cite two headquarters ruling letters (HQ) in which we held that the braided straps on handbags were more than de *minimis*. In HQ 089386, dated March 18, 1992, we held that the braided shoulder straps on a ladies evening handbag were fully functional and likely to be used to carry the bag over the shoulder. Moreover, we found that the braided straps enhanced the utility and style of the bag and were a commercially significant part thereof. We stated that "[t]he braid itself is a more extravagant way of forming the shoulder strap, and adds to the expense and complexity of manufacture." Additionally, in HQ 959062, dated January 28, 1997, we held that a handbag was classifiable "in part of braid" where the braided material on the handbag was fully functional, formed the entire strap and heightened the bag's overall aesthetic appeal.

On the other hand, Customs has ruled that similar bags were "not in part of braid" where the bag had only a 1/8 inch wide braided strip of fabric attached to the top of the bag to hold together gathers, or where the braid was sewn into the fabric so that it could not be seen. HQ 081483, dated April 27, 1989. Similarly, in HQ 088050, dated January 10, 1991, Customs considered *de minimis* a small braided strip of fabric, measuring 1/8 inch wide, which was used to hold the gathers of a child's handbag secure.

In the instant case, the braided straps on the two handbags are similar to those in HQ 089386 and HQ 959062. The braided straps are fully functional and are designed to carry the handbags over the shoulder. Moreover, the braid forms the entire length of the shoulder straps and heightens the bags' aesthetic appeal. Accordingly, we find that the handbags are classifiable as "in part of braid."

Holding:

NY D82380 is revoked. The braided shoulder straps on the handbags at issue are more than de *minimis*. Accordingly, the handbags are classifiable under subheading

4202.22.4030, HTSUSA, which provides for "Handbags, whether or not with shoulder strap, including those without handle: With outer surface of sheeting of plastic or of textile materials: With outer surface of textile materials: Wholly or in part of braid: Other." They are dutiable at the 1999 general one column rate of 7.9 percent *ad valorem*, and the textile restraint category is 670.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest you check close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service which is updated weekly and is available **for inspection** at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED MODIFICATION OF CUSTOMS RULING LETTER RELATING TO THE COUNTRY OF ORIGIN DETERMINATION OF BRAIDED CORD

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of ruling letter concerning the country of origin of braided cord.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the country of origin of braided cord produced from man-made fiber filament yarns extruded in Canada and further processed in Macau. Customs invites comments on the correctness of this proposal.

DATE: Comments must be received on or before April 2, 1999.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, NW, Washington, D.C. 20229. Submitted comments may be inspected at the same location during regular business hours.

FOR FURTHER INFORMATION: Phil Robins, Textile Branch, Office of Regulations and Rulings, 202–927–1031.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Moderniza-

tion) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Star. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the country of origin of braided cord produced from man-made fiber filament yarns extruded in Canada and further processed in Macau. Customs invites comments on the correctness of this proposal.

New York Ruling Letter (NY) C83113, dated February 17, 1998, concerned the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) and country of origin of braided cord. NY C83113 is set forth as Attachment A to this document. The cord was made from man-made fiber filament yarn extruded in Canada and shipped to Macau to be made into braided cord. Although NY C83113, correctly concluded the applicable HTSUSA subheading for the cord is 5607.50.4000, HTSUSA, the provision for braided twine, cordage, or ropes, Customs incorrectly determined the country of origin as Macau. It is now Customs position that the country of origin is Canada. Proposed Headquarters Ruling Letter 961984 is set forth as Attachment B to this document.

Prior to taking this action we will give consideration to any written comments received in a timely manner. Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of the publication of this notice.

Dated: February 9, 1999.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, February 17, 1998.

CLA–2–RR:NC:TA:351 C83113
Category: Classification

MR. JOSEPH R. HOFFACKER
BARTHCO TRADE CONSULTANTS, INC.
7575 Holstein Avenue
Philadelpia, PA 19153

Re: Classification and country of origin determination for braided cord produced in Macau from yarn supplied from Canada; 19 C.F.R. §102.21(c)(3)(4).

DEAR MR. HOFFACKER:

This is in reply to your letter dated December 17, 1997, on behalf of Coghlan's Ltd., Winnipeg, Canada, requesting a classification and country of origin determination for braided cord produced in Macau from yarn supplied from Canada. No sample was submitted.

Facts:

You write requesting an origin ruling of polypropylene cord, then go on to write about nylon yarn being shipped from Canada. We will assume it is the nylon being processed. The man-made fiber filament yarn that you describe as 100% Fiberstock, 470 dtex, 420 denier, merge 00WV0) is produced in Canada (Dupont Trade Name "WVO 00") and then shipped to Macau for further processing. This yarn likely falls under either heading 5402 or 5404. In Macau, you outline the following 6 processing operations:

1) Setting the yarn—combining the yarn together for forming larger denier according to the required size and firmly set in uniformity on stretching and setting machine or twisting machines for twisting, if necessary.
2) Bobbining—winding by bobbin machine into bobbins before braiding.
3) First braiding—the bobbins are put on the braiding machine to braid the center of the cord.
4) Second braiding—the required number of bobbins are put on the braiding machine to braid coat over the center of the cord for the required size.
5) After quality checking, the finished braided cords are put on the reeling machine to make up the reel of the required length.
6) Labeling the reel—wrap the reel with shrinkage film by shrinkage machine and then pack into boxes and cartons.

Issue:

What is the classification and country of origin of the subject merchandise?

Classification:

The applicable subheading for the cord is 5607.50.4000 (not under 5607.49 as indicated in your letter), Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for twine, cordage, ropes and cables, whether or not plaited or braided, * * * of other synthetic fibers (nylon), other, braided. The duty rate is 5.8 percent ad valorem.

This cord falls within textile category designation 669. The designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes. To obtain the most current information available, we suggest that you check, close to the time of shipment, the Status Report on Current Import Quotas (Restraint Levels), an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

Country Of Origin—Law and Analysis:

On December 8, 1994, the President signed into law the Uruguay Round Agreements Act. Section 334 of that Act (codified at 19 U.S.C. §3592) provides new rules of origin for textiles and apparel entered, or withdrawn from warehouse, for consumption, on and after July 1, 1996. On September 5, 1995, Customs published Section 102.21, Customs Regulations, in the Federal Register, implementing Section 334 (60 FR 46188). Thus, effective July 1, 1996, the country of origin of a textile or apparel product shall be determined by sequential application of the general rules set forth in paragraphs (c)(1) through (5) of Section 102.21.

Paragraph (c)(1) states that "The country of origin of a textile or apparel product is the single country, territory, or insular possession in which the good was wholly obtained or produced." As the subject cord is not wholly obtained or produced in a single country, territory or insular possession, paragraph (c)(1) of Section 102.21 is inapplicable.

Paragraph (c)(2) states that "Where the country of origin of a textile or apparel product cannot be determined under paragraph (c)(1) of this section, the country of origin of the good is the single country, territory, or insular possession in which each of the foreign materials incorporated in that good underwent an applicable change in tariff classification, and/or met any other requirement, specified for the good in paragraph (e) of this section:"

Paragraph (e) in pertinent part states that "The following rules shall apply for purposes of determining the country of origin of a textile or apparel product under paragraph (c)(2) of this section":

HTSUS	*Tariff shift and/or other requirements*
5607.50.4000	A change to subheading 5607 if the good is of continuous filaments, including strips, a change of those filaments, * * * to heading 5607 from any other heading, except from heading 5001 through 5007, 5401 through 5406, and 5501 through 5511, and provided that the change is the result of an extrusion process.

The subject cord in this scenario, undergoes a change to subheading 5607.50.4000, HTS, from heading 5402 or 5404. Since this change is excluded by the rule, Section 102.21(c)(2) is inapplicable and our hierarchical application of Section 102.21(c) continues.

Section 102.21(c)(3) states that, "Where the country of origin of a textile or apparel product cannot be determined under paragraph (c)(1) or (2) of this section":

> (i) If the good was knit to shape, the country of origin of the good is the single country, territory, or insular possession in which the good was knit; or
>
> (ii) Except for goods of heading 5609, 5807, 5811, 6213, 6214, 6301 through 6306, and 6308, and subheadings 6209.20.5040, 6307.10, 6307.90, and 9404.90, if the good was not knit to shape and the good was wholly assembled in a single country, territory, or insular possession, the country of origin of the good is the country, territory, or insular possession in which the good was wholly assembled.

Although twisting of a yarn is considered an assembly operation, braiding is viewed as a manufacturing operation (HRL 555594 LS of May 16, 1990 noted). Therefore, CFR 102.21(c)(3) is inappropriate.

Section 102.21(c)(4) provides:

> "Where the country of origin of a textile or apparel product cannot be determined under paragraph (c)(1), (2) or (3) of this section, the country of origin of the good is the single country, territory, or insular possession in which the most important assembly or manufacturing process occurred."

As that operation appears to be the processing or further manufacture into braided cord in Macau, and since section 102.21(c)(4) looks to the country, territory, or insular possession in which the "most important" assembly or manufacturing process occurred as conferring origin, the country of origin is deemed, to be Macau.

Holding:

The country of origin of the braided cord is Macau. Based upon international textile trade agreements products of Macau are subject to the requirement of a visa.

Accordingly, this cord should be marked "Product of Macau".

The holding set forth above applies only to the specific factual situation and merchandise identified in this ruling request. This position is clearly set forth in section 19 C.F.R. §177.9(b)(1). This sections states that a ruling letter, either directly, by reference, or by implication, is accurate and complete in every material respect.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177). Should it be subsequently determined that the information furnished is not complete and does not comply with 19 C.F.R. §177.9(b)(1), the ruling will be subject to modification or revocation. In the event there is a change in the facts previously furnished, this may affect the determination of country of origin. Accordingly, if there is any change in the facts submitted to Customs, it is recommended that a new ruling request be submitted in accordance with 19 C.F.R. §177.2.

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist George Barth at 212–466–5884.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA-2 RR:CR:TE 961984 DNM
Category: Country of Origin

MR. JOSEPH HOFFACKER
BARTHCO TRADE CONSULTANTS, INC.
7575 Holstein Avenue
Philadelphia, PA 19153

Re: Reconsideration of New York Ruling Letter (NY) C83113; concerning country of origin of braided cord produced from yarn extruded in Canada.

DEAR MR. HOFFACKER:

This is in reference to NY C83113, dated February 17, 1998, issued to your company on behalf of Coghlan's Ltd., Winnipeg, Canada. The ruling held the country of origin of certain braided cord to be Macau. We have reviewed NY C83113 and have determined that the holding in NY C83113 regarding country or origin is incorrect. Accordingly, this ruling modifies that portion of NY C83113 which deals with the country of origin of the goods in question.

Facts:

NY C83113 ruled on the classification and country of origin of a braided cord produced from man-made fiber filament yarn that you described as 100% Fiberstock, 470 dtex, 420 denier, merge 00WV00 (DuPont® Trade Name "WVO 00") extruded in Canada and shipped to Macau for six additional processing steps to make the yarn into braided cord. The extruded yarn is then shipped to Macau for the following six processing operations:

1. Setting the yarn—combining the yarn together to form larger denier yarn according to the required size and firmly set in uniformity on stretching and setting machine or twisting machines for twisting, if necessary.
2. Bobbining—winding by bobbin machine onto bobbins before braiding.
3. First braiding—the bobbins are put on the braiding machine to braid the center of the cord.
4. Second braiding—the required number of bobbins are put on the braiding machine to produce a braid over the center cord.
5. After quality checking, the finished braided cords are put on the reeling machine to make up the reel of the required length.
6. Labeling the reel—wrap the reel with shrinkage film by shrinkage machine and then pack into boxes and cartons.

Issue:

What is the country of origin of braided cord made from man-made fiber filament yarn extruded in Canada and shipped to Macau to be made into braided cord?

Law and Analysis:

In NY C83113, Customs correctly concluded the applicable HTSUSA subheading for the braided cord is 5607.50.4000, HTSUSA. However, Customs incorrectly determined the country of origin as Macau. On December 8, 1994, the President signed into law the Uruguay Round Agreements Act. Section 334 of that Act (codified at 19 U.S.C. 3592) provides rules of origin for textiles and apparel entered, or withdrawn from a warehouse, for consumption, on and after July 1, 1996. On September 5, 1995, Customs published Section 102.21, Customs Regulations, in the Federal Register, implementing Section 334 (60 FR 46188). Thus, effective July 1, 1996, the country of origin of a textile or apparel product shall be determined by sequential application of the general rules set forth in paragraphs (c)(1) through (5) of Section 102.21.

Section 102.21 (c)(1) states that the country of origin of a textile or apparel product is the single country, territory, or insular possession in which the good was wholly obtained or produced. As the subject merchandise was not wholly obtained or produced in a single country, section (c)(1) is not applicable.

Section 102.21(c)(2) states that where the country of origin of a textile or apparel product cannot be determined under paragraph (c)(1) of this section, the country of origin of the good is the single country, territory, or insular possession in which each foreign material incorporated in that good underwent an applicable change in tariff classification, and/or met any other requirement specified for the good in paragraph (e) of this section.

The applicable portion of section 102.21(e) states that the following rules shall apply for purposes of determining the country of origin of a textile or apparel product under paragraph (c)(2) of this section:

> 5607 If the good is of continuous filaments, including strips, a change of those filaments, including strips, to heading 5607 from any other heading, except from heading 5001 through 5007, 5401 through 5406, and 5501 through 5511, and provided that the change is the result of an **extrusion process.** (emphasis added)

The subject extruded cord, classified in heading 5607, HTSUSA underwent a change to this heading from heading 5402 through 5405, HTSUSA, the provisions for man-made fiber yarns. Headings 5402 through 5405, HTSUSA, are excluded by the terms of the tariff shift rule applicable to goods classifiable under heading 5607, HTSUSA. Therefore section 102.21(c)(2) is inapplicable to the subject merchandise.

Section 102.21(c)(3) provides that where the country of origin of a textile or apparel product cannot be determined under paragraphs (c)(1) or (c)(2):

> (i) If the good was knit to shape, the country of origin of the good is the single country, territory, or insular possession in which the good was knit; or
> (ii) Except for goods of heading 5609, 5807, 5811, 6213, 6214, 6301 through 6306, and 6308, and subheadings 6209.20.5040, 6307.10, 6307.90, and 9404.90, if the good was not knit to shape and the good was wholly assembled in a single country, territory, or insular possession, the country of origin of the good is the country, territory, or insular possession in which the good was wholly assembled.

In order to effectuate the requirements of section 334 (19 U.S.C. 3592), Customs position is that the plying or braiding of yarns, or otherwise assembling yarns to form a single yarn, braid, cord, twine, etc., is not an assembly process. Accordingly, since the subject goods are neither knit to shape nor assembled, those goods do not satisfy paragraph (c)(3).

Section 102.21(c)(4) states that where the country of origin of a textile or apparel product cannot be determined under paragraph (c)(1), (2) or (3), the country of origin of the good is the single country, territory, or insular possession in which the most important assembly or manufacturing process occurred.

It is Customs view, consonant with the provisions of section 334 (19 U.S.C. 3592), that the most important manufacturing process in the production of braided cords occurs at the time the continuous filaments forming those cords are extruded, which occurs in Canada.

Holding:

The country of origin is Canada.

The holding set forth above applies only to the specific factual situation and merchandise identified in the ruling request. This position is clearly set forth in section 177.9(b)(1), Customs Regulations (19 CFR 177.9(b)(1)). This section states that a ruling letter is issued on the assumption that all of the information furnished in the ruling letter, either directly, by reference, or by implication, is accurate and complete in every material respect.

Should it be subsequently determined that the information furnished is not complete and does not comply with 19 CFR 177.9(b)(1), the ruling will be subject to modification or revocation. In the event there is a change in the facts previously furnished, this may affect the determination of country of origin. Accordingly, if there is any change in the facts submitted to Customs, it is recommended that a new ruling request be submitted in accordance with 19 CFR 177.2.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories applicable to textile merchandise, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels),* an issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

JOHN DURANT,
Director,
Commercial Rulings Division.

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, February 17, 1999.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

PROPOSED REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF KEYBOARD STORAGE DRAWER

AGENCY: U.S. Customs Service; Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke New York Ruling Letter (NY) 886420, relating to the tariff classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of a computer keyboard storage drawer. Comments are invited on the correctness of the proposed revocation.

DATE: Comments must be received on or before April 2, 1999.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to: U.S. Customs Service, Office of Regulations and Rulings, Attention: General Classification Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be inspected at the same location during regular business hours.

FOR FURTHER INFORMATION CONTACT: Andrew M. Langreich, General Classification Branch (202) 927–2318.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Moderniza-

tion) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling relating to the tariff classification of a computer keyboard storage drawer. Comments are invited on the correctness of the proposed revocation.

NY 886420, dated May 27, 1993, classified a keyboard storage drawer in subheading 8304.00.00, HTSUS, which provides for desk-top filing or card-index cabinets, paper trays, paper rests, pen trays, office-stamp stands and similar office or desk equipment and parts thereof, of base metal. NY 886420 is set forth as "Attachment A" to this document.

It is now Customs position that this merchandise is classifiable under subheading 8473.30.50, HTSUS, which provides for other parts and accessories intended for use with computers. Proposed HQ 962144 revoking NY 886420 is set forth as "Attachment B" to this document. Before taking this action, consideration will be given to any written comments timely received.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: February 12, 1999.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
New York, NY, May 27, 1993.

CLA–2–83:S:N:N3:113 886420
Category: Classification
Tariff No. 8304.00.0000

MS. CINDY SHIMMEL
THE I.C.E. COMPANY, INC.
P.O. Box 610583
Dallas/Fort Worth Airport, TX 75261–0583

Re: The tariff classification of a desktop keyboard drawer from Taiwan.

DEAR MS. SHIMMEL:

In your letter dated May 14, 1993, on behalf of Prairie Marketing, you requested a tariff classification ruling.

The merchandise is a desktop keyboard drawer. It consists of a solid steel case with an interior plastic, easy-glide drawer. The case will support a monitor and a CPU, and the drawer will accommodate a keyboard.

The applicable subheading for the drawer will be 8304.00.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for desk-top filing or card index cabinets, paper trays, paper rests, pen trays, office-stamp stands and similar office and desk equipment and parts thereof, of base metal. The rate of duty will be 5.7 percent ad valorem.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 962144 AML
Category: Classification
Tariff No. 8473.30.50

ERIK D. SMITHWEISS, ESQUIRE
GRUNFELD, DESIDERIO, LEBOWITZ & SILVERMAN, LLP
245 Park Avenue
33rd Floor
New York, NY 10167–3397

Re: Keyboard storage drawer; 8304.00.00; 9403.10.00; 8473.30.50; NY 886420; HQ 089415.

DEAR MR. SMITHWEISS:

In a letter to the Customs National Commodity Specialist Division, New York, dated August 10, 1998, on behalf of Staples, Inc., you request reconsideration of New York Ruling Letter (NY) 886420, dated May 27, 1993, concerning the classification of a keyboard storage drawer under the Harmonized Tariff Schedule of the United States (HTSUS). Your request has been forwarded to this office for reply, and a sample was submitted for our review. In preparing this decision, consideration was also given to arguments you presented in a meeting held on December 16, 1998.

Facts:

The subject article is a keyboard storage drawer that is designed for use with automatic data processing machines. It measures 15 and 1/2 inches deep, 22 inches wide and 3 and 3/4 inches high, and is comprised of a rectangular, metal housing which encloses a plastic drawer. The plastic drawer, which measures 9 and 7/8 inches deep, 20 and 3/4 inches wide and 3 and 1/4 inches high, is molded to hold a computer keyboard. The article is composed of 83% metal and 17% plastic by value, and is designed to enhance the use of and house the keyboard by means of the drawer, which is extended while in use and retracted within the housing when not in use. The sturdy metal housing acts as a stand for the monitor of the computer.

Issue:

Whether the keyboard storage drawer is properly classifiable within subheading 8304.00.00, HTSUS, which provides for desk-top filing or card-index cabinets * * * and similar office or desk equipment * * * of base metal, other than office furniture of heading 9403; 8473.30.50, HTSUS, which provides for other parts and accessories suitable for use solely or principally with the machines of heading 8471, not incorporating a CRT; or 9403.10.00, HTSUS, which provides for other furniture of metal of a kind used in offices.

Law and Analysis:

Classification of imported merchandise is accomplished pursuant to the Harmonized Tariff Schedule of the United States (HTSUS). Classification under the HTSUS is guided by the General Rules of Interpretation of the Harmonized System (GRI's). GRI 1, HTSUS,

states in part that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes[.]"

The applicable subheadings under consideration are as follows:

8304.00.00	Desktop filing or card-index cabinets, paper trays, paper rests, pen trays, office-stamp stands and similar office or desk equipment and parts thereof, of base metal, other than office furniture of heading 9403.
* * * * * * *	
8473	Parts and accessories (other than covers, carrying cases and the like) suitable for use solely or principally with machines of headings 8469 to 8472:
8473.30	Parts and accessories of the machines of heading 8471:
	Not incorporating a cathode ray tube:
8473.30.50	Other.
* * * * * * *	
9403	Other furniture and parts thereof:
9403.10.00	Metal furniture of a kind used in offices

When interpreting and implementing the HTSUS, the Explanatory Notes (EN's) of the Harmonized Commodity Description and Coding System may be utilized. The EN's, while neither legally binding nor dispositive, provide a guiding commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. See, T.D. 89–90, 54 Fed. Reg. 35127, 35128 (August 23, 1989). The guidance of the EN's is necessary in the instant analysis.

Classification of the subject article within subheading 9403.10.00 has been suggested. We address this heading first because, if the article is described in this heading, classification in either of the other headings is precluded by the specific exclusion of office furniture of heading 9403 enumerated in heading 8304, and EN 84.73. Heading 9403, HTSUS, provides for other furniture and parts thereof. Chapter 94, Note 2 provides that in order to be classified within this heading, an article must be designed for placing on the floor or ground, unless the articles are "[c]upboards, bookcases or other shelved furniture and unit furniture" or "[s]eats and beds" which are "designed to be hung, to be fixed to the wall or to stand one on the other." The subject article does not satisfy this requirement; it is designed to be placed onto a desk. Nor does it fall within the exception, i.e., it is not designed to "be hung, to be fixed to the wall or to stand one on the other." Accordingly, classification in heading 9403, HTSUS, is precluded.

EN 83.04, p. 1215 states:

> The heading covers filing cabinets, card-index cabinets, sorting boxes and similar office equipment used for the storage, filing or sorting of correspondence, index cards or other papers, provided the equipment is not designed to stand on the floor or is not otherwise covered by Note 2 to Chapter 94 (heading 94.03) (see the General Explanatory Note to Chapter 94). The heading also includes paper trays for sorting documents, paper rests for typists, desk racks and shelving, and desk equipment (such as bookends, paperweights, inkstands and ink-pots, pen trays, office-stamp stands and blotters).

In HQ 089415, dated November 7, 1991, we classified a Cathode Ray Tube (CRT) Valet within subheading 8473.30.40, HTSUS, which provided "for parts and accessories of the machines of heading 8471 which do not incorporate a CRT." In that ruling, consideration was given to classification of the CRT Valet in subheading 8304, HTSUS, which provided for "[d]esk-top filing or card-index cabinets * * * and similar office or desk equipment * * * of base metal, other than furniture of heading 9403." In that ruling we interpreted the scope of subheading 8304.00.00, HTSUS, *vis-a-vis* the rule of statutory construction, *ejusdem generis*, as follows:

> [t]he Court of International Trade (CIT) has stated that the canon of construction *ejusdem generis*, which means literally, of the same class or kind, teaches that "where particular words of description are followed by general terms, the latter will be regarded as referring to things of a like class with those particularly described." *Nissho-Iwai American Corp. v. United States (Nissho)*, 10 CIT 154, 156 (1986). Heading 8304, HTSUS, consists of particular words (*i.e.*, paper trays, paper rests etc.) followed by general terms (*i.e.*, similar office or desk equipment). Therefore, this heading requires an *ejusdem generis* method of construction.
>
> The CIT further stated that "[a]s applicable to Customs classification cases, *ejusdem generis* requires that the imported merchandise possess the essential character-

istics or purposes that unite the articles enumerated *eo nomine* in order to be classified under the general terms." *Nissho*, p. 157. The subject CRT valets are not *ejusdem generis* with the articles described within heading 8304, HTSUS. They are not equipment used to hold or store similar desk or office articles (*i.e.*, index cards, files, paper, pens etc.). The valets are more accurately described as stands for the machines of heading 8471, HTSUSA. Accordingly, the subject valets do not satisfy the terms of heading 8304, HTSUSA, and are not, therefore, properly classifiable therein.

The rule of statutory construction *ejusdem generis* has been further explained in the treatise "Customs Law and Administration" as follows:

> [a]nother rule of statutory construction is that of *ejusdem generis*, the substance of which is that where particular words of description are followed by general terms, the latter will be regarded as referring to things of like class with those particularly described. It is invoked as an aid to statutory construction and is applicable when doubt arises as to whether a given article is to be placed in a class of which some individual objects are named. *United States v. Damrak Trading Co., Inc.*, 43 CCPA 77, 79, C.A.D. 611 (1956) (citations omitted); *Merck and Co. (Inc.) v. United States*, 19 CCPA 16, 18, T.D. 44852 (1931), (citations omitted). It may not be resorted to where there is no doubt as to the meaning of a term. *John V. Carr & Son v. United States*, 77 Cust. Ct. 103, C.D. 4679 (1976).
>
> * * * * * * *
>
> The rule may not be invoked to narrow, limit or circumscribe an enactment and is never applied if the intention of the legislature can be ascertained without resort thereto. *Sandoz Chemical Works, Inc. v. United States*, 50 CCPA 31, 35, C.A.D. 815 (1963). Sturm, Ruth; *Customs Law & Administration*, 3rd Edition, section 51.10, p. 67.

The subject article is designed specifically to house a computer keyboard. Although the drawer itself is manufactured with compartments intended to hold pens and paper clips, its fundamental design feature is the drawer manufactured with an impression designed to hold the keyboard and act as a stand for the computer monitor. This design feature keeps both in close proximity of each other as they are normally used with the computer. Further, by virtue of the compartment manufactured specifically to house and stabilize the keyboard, the product cannot be deemed to be a paper organizer or desk top holder of papers or supplies as contemplated by heading 8304, HTSUS. Accordingly, classification in heading 8304, HTSUS, is precluded.

EN 84.73 at pp. 1411 and 1412, states in pertinent part:

> Subject to the general provisions regarding the classification of parts (see the General Explanatory Note to Section XVI), this heading covers parts and accessories suitable for use solely or principally with the machines of headings 84.69 to 84.72.
>
> The accessories covered by this heading are interchangeable parts or devices designed to adapt a machine for a particular operation, or to perform a particular service relative to the main function of the machine, or to increase its range of operations.
>
> * * * * * * *
>
> But the heading excludes covers, carrying cases and felt pads; these are classified in their appropriate headings. It also excludes articles of furniture (e.g., cupboards and tables) whether or not specially designed for office use (heading 94.03). However, stands for machines of headings 84.69 to 84.72 not normally usable except with the machines in question, remain in this heading.

We note that the HTSUS does not contain a specific, uniform definition for the term "accessory." EN 84.73, above, defines "accessories" as "interchangeable parts or devices designed to adapt a machine for a particular operation, or to perform a particular service relative to the main function of the machine, or to increase its range of operations."

In Headquarters Ruling Letter (HQ) 087704, dated September 27, 1990, we noted the absence of a definition of the term "accessory." We reached the following conclusion as to the meaning of the term "accessory" which we believe may be properly used as guidance in this instance:

> An accessory is generally an article which is not necessary to enable the goods with which it is used to fulfill their intended function. An accessory must be identifiable as being intended solely or principally for use with a specific article. Accessories are of secondary or subordinate importance, not essential in and of themselves. They must, however, somehow contribute to the effectiveness of the principal article (e.g., facili-

tate the use or handling of the principal article, widen the range of its uses, or improve its operations.)

The article houses a keyboard in a drawer which is molded to snugly house and stabilize the keyboard. The article also protects the keyboard when not in use, by shielding the keyboard within the metal housing. The metal housing is capable of acting as a stand for the ADP monitor, further confirming that the intended and practical uses of the article are as a storage drawer for a computer keyboard. Thus, in several ways the keyboard storage drawer is "designed to adapt a machine for a particular operation, or to perform a particular service relative to the main function of the machine, or to increase its range of operations." The keyboard storage drawer is classified in heading 8473, HTSUS.

This decision comports with HQ 089415, dated November 7, 1991, which classified a CRT Valet pursuant to subheading 8473.30.40, HTSUS, 1991. The similarity with the instant matter is that the CRT Valet enhances the use and operation of the ADP monitor by enabling the user to reposition the monitor while the computer is in use, thereby enhancing the use and function of the computer. The keyboard storage drawer performs a similar function; it houses the keyboard when the computer is or is not in use, and may serve as a stand for the monitor, thereby enhancing the use and function of the computer.

Holding:

The subject keyboard storage drawer is properly classifiable within subheading 8473.30.50, HTSUS, which provides for, *inter alia*, other parts and accessories (other than covers, carrying cases and the like) suitable for use solely or principally with computers.

Effect on Other Rulings:

NY 886420, dated May 27, 1993, is **revoked**.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED MODIFICATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF TOILETRY BAG AND TOILETRIES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (P.L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling letter pertaining to the tariff classification of a toiletry bag and toiletries. The merchandise is a vinyl toiletry bag and facial creams and cleanser. The travel toiletry bag is imported from China into a Foreign Trade Zone (FTZ) in nonprivileged status. The bag is clear polyvinyl chloride (PVC) plastic, trimmed in gold-toned plastic including its handle. The bag's dimensions are 6½ by 3 by 4¾ inches. It has a short handle across the top of its rectangular shape, is zippered around the top edge, and resembles a small handbag or train case in appearance. In the FTZ, U.S. origin lotions and cleanser,

full-sized and in plastic containers are placed in the bag with tissue paper, which in turn is packaged in a cardboard box. The bag and contents is exported from the FTZ and imported into the customs territory of the U.S.

DATE: Comments must be received on or before April 2, 1999.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Gail A. Hamill, Textiles Branch (202) 927–1342.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (P.L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling letter pertaining to the tariff classification of a toiletry bag and toiletries. Customs invites comments on the correctness of the proposed revocation.

In New York ruling letter (NY) A80575, dated April 2, 1996, set forth as Attachment A, the toiletry bag in issue was classified under subheading 4202.92.4500, Harmonized Tariff Schedule of the United States Annotated (HTSUSA) which provides for travel, sport and similar bags, of plastic sheeting. The U.S. origin toiletries packed therein were classified in subheading 9801.00.1098, which provided for U.S. origin goods returned after having been exported without having been advanced in value or improved in condition by any other means while abroad, other.

It is now Customs position that the skin care products of U.S. origin are not considered exported by virtue of admission into an FTZ in domestic status. They are put into the FTZ for purposes of packaging them in the toiletry bag and cardboard box, and as such, they are not considered mixed or combined in the FTZ with foreign bags as a result of their placement in those containers. There are no procedural requirements for their entry into the customs territory when packaged. 19 CFR 146.43(b)–(c). The bag and cardboard box must be entered in order to be brought from the FTZ into the customs territory. The cardboard box is classified and dutiable with the toiletry bag as GRI 5(b) packing material if of foreign origin. If it is of U.S. origin, the box remains classified with the toiletry bag, but would be entitled to the exemption in the second proviso to 19 U.S.C. 81c(a).

Customs intends to modify NY A80575, in order to clarify that goods are not considered exported by virtue of admission into an FTZ in domestic status, nor are there any procedural requirements for their entry into the customs territory when packaged in various containers,

but neither mixed nor combined therewith. Before taking this action, we will give consideration to any written comments timely received. Proposed HQ 959265, modifiying NY A80575, is set forth as Attachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9) will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: February 10, 1999.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, April 2, 1996.

CLA–2–42:RR:NC:WA:341 A80575
Category: Classification
Tariff No. 4202.92.4500 and 9801.00.1098

MR. DAVID A. EISEN
SIEGEL, MANDELL & DAVIDSON, P.C.
One Astor Plaza
1515 Broadway
New York, NY 10036–7900

Re: The tariff classification of a toiletry bag and toiletries.

DEAR MR. EISEN:

In your letter dated February 20, 1996 you requested atariff classification ruling. The request is on behalf of Avon products, Inc.

The sample submitted, "New Mothers Day Gift Set", is a travel toiletry bag of clear Polyvinyl Chloride (PVC) plastic sheeting from China. The bag contains various U.S. origin toiletry products. You have indicate the toiletry bag will be admitted at the time of importation into a Foreign Trade Zone (FTZ). The U.S. origin toiletries, already packaged in individual retail containers, will be admitted into the FTZ as domestic goods and placed within the toiletry bag. The items will be packed within a common retail box of printed plastic coated paperboard. The articles will then be transferred to the Customs territory of the United States. The merchandise will be offered for retail sale without additional packing. Your sample is being returned as requested.

The applicable subheading for the toiletry bag of PVC will be 4202.92.4500, Harmonized Tariff Schedule of the United States (HTS), which provides for travel, sport and similar bags, with outer surface of sheeting of plastics. The rate of duty will be 20 percent ad valorem.

The applicable subheading for the U.S. origin toiletries will be 9801.00.1098, which provides for products of the United States when returned after having been exported without having been advanced in value or improved in condition by any other means while abroad, other. The duty rate will be Free.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the timethis merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Kevin Gorman at 212–466–5893.

ROGER J. SILVESTRI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:TE 959265 gah
Category: Classification
Tariff No. 4202.92.4500

MR. LOUIS S. SHOICHET
TOMPKINS AND DAVIDSON
One Astor Plaza
1515 Broadway, 43rd floor
New York, NY 10036

Re: Modification of NY ruling A80575 dated April 2, 1996, plastic sheeting toiletry bag; FTZ; not a travel set of heading 9605, not a 3(b) set with U.S. origin toiletries.

DEAR MR. SHOICHET:

This is in regard to your letter of May 22, 1996, requesting reconsideration of New York ruling (NY) A80575 that was issued to you on April 2, 1996, which addressed the tariff classification of a Mother's Day toiletry gift set produced for Avon under the Harmonized Tariff Schedule of the United States, Annotated (HTSUSA). We have reviewed this ruling and determined that it is incorrect as to the treatment of U.S. goods combined with foreign goods in a Foreign Trade Zone and then entered into the customs territory of the United States.

Facts:

The travel toiletry bag is imported from China into a Foreign Trade Zone (FTZ) in non-privileged status. The bag, which is not specially shaped or fitted, is made of clear polyvinyl chloride (PVC) plastic, trimmed in gold-toned plastic including its handle. The bag's dimensions are 6½ by 3 by 4¾ inches. It has a short handle across the top of its rectangular shape, is zippered around the top edge, and resembles a small handbag or train case in appearance. In the FTZ, U.S. origin lotions and cleanser, full-sized and in plastic containers are placed in the bag with tissue paper, which in turn is packaged in a cardboard box. The bag and contents is exported from the FTZ and imported into the customs territory of the U.S.

Issue:

Whether the gift set is classifiable as a travel set of heading 9605, a set put up for retail sale, or separately classifiable by article?

Law and Analysis:

Classification of merchandise under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification is determined according to the terms of the headings and any relative section or chapter notes. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI.

Nonprivileged foreign merchandise is subject to tariff classification in accordance with its character, condition, and quantity at the time of transfer from the FTZ to customs territory at the time the entry or entry summary is filed with Customs. 19 C.F.R. 146.65(a)(2). Therefore, the article to be classified is the complete gift set.

Heading 9605, HTSUSA, covers travel sets for personal toilet, sewing or shoe or clothes cleaning (other than manicure and pedicure sets of heading 8214). The heading's Explanatory Note (EN) describes travel sets in more detail. While the EN are not legally binding, they are instructive as to the intended scope of headings in the Harmonized System. T.D. 89–80, 54 F.R. 35127, 35128 (Aug. 23, 1989). The EN states that travel sets consist of articles individually falling in different headings of the nomenclature or consist of different articles of the same heading. The toiletry bag is classifiable in heading 4202, HTSUSA, the eye care cream, facial skin moisturizer and face cream are classified in heading 3304, HTSUSA, and the face cleanser is classified in heading 3402, HTSUSA.

Toilet sets are further described as a set of articles presented in a case of leather, fabric or plastics, containing, e.g., molded plastic boxes, brushes, a comb, scissors, tweezers, a nail file, a mirror, a razor holder and manicure instruments. While these are only exemplars, they suggest a range of implements and containers that aid in different aspects of one's personal toilet. Personal toilet is defined as pertaining to washing and dressing oneself. *See* 2 Compact Ed., Oxford English Dictionary 3342 (1987). The skin care articles at issue here form part of one's personal toilet, and thus meet this common meaning.

You argue that the skin care articles meet the requirements set forth in the EN for GRI 3(b) sets put up for retail sale, and that those criteria should apply in the finding of a travel set. Heading 9605 is a GRI 1 classification. As a legal matter, classification in that provision pertains if the goods at issue are specifically described therein, that is, they meet the terms of the heading, and any related legal notes. Resort to GRI 3(b) is not necessary for classification in heading 9605, and we decline to do so.

In your submission of May 22, 1996, you cite HQ 951486, in which we opined that the size of the case classifiable as part of a heading 9605 travel set need not be restricted to a size which could contain only the articles sold therewith. You extend that reasoning to the proposition that containers within 9605 travel sets need not be empty to remain a part of a travel set. We agree.

However, the skin care containers at issue are full-size, useful for weeks or months of skin preparation. There is nothing about the size of the toilet preparations that distinguishes them as specifically suited for travel, nor are they intended to be reusable containers. We find that the articles do not meet the description of a travel set for personal toilet.

GRI 3(a) indicates that when goods such as the ones at issue are classifiable in more than one heading, headings which refer to part only of the items put up for retail sale, the headings are to be regarded as equally specific. GRI 3(b) states that to meet the criteria of a set put up together for retail sale, articles must, *inter alia*, be put up for retail sale to meet a particular need or activity. The creams and lotions meet the activity of skin care. However, the toiletry case does not sufficiently relate to the other goods to form a set. It is twice as large as would be necessary to hold the toiletries and is designed to outlast their use. It provides an incentive to purchase the toiletries which is independent of its use with them. We find an insufficient nexus between the bag and the toiletries to form a set put up for retail sale. The goods are therefore classified separately.

In NY A80575, we classified the skin care products in subheading 9801.00.1098, which provides duty free treatment for U.S. origin goods returned after having been exported without having been advanced in value or improved in condition by any other means while abroad. This is incorrect.

The skin care products of U.S. origin are not considered exported by virtue of admission into an FTZ in domestic status. They are put into the FTZ for purposes of packaging them in the toiletry bag and cardboard box, and as such, they are not considered mixed or combined in the FTZ with foreign bags as a result of their placement in those containers. There are no procedural requirements for their entry into the Customs territory when packaged. 19 CFR 146.43(b)–(c). The bag and cardboard box must be entered in order to be brought from the FTZ into the Customs territory. The cardboard box is classified and dutiable with the toiletry bag as GRI 5(b) packing material if of foreign origin. If it is of U.S. origin, the box remains classified with the toiletry bag, but would be entitled to the exemption in the second proviso to 19 U.S.C. 81c(a).

For your information, were they not of U.S. origin, the eye care cream, facial skin moisturizer and face cream would be classifiable in subheading 3304.99.5000, HTSUSA, as other preparations for the care of the skin. The face cleanser in turn would be classifiable in subheading 3402.20, HTSUSA, as a washing preparation put up for retail sale, specifically subheading 3402.20.1000, HTSUSA, if containing aromatic components (benzenoid com-

pounds), or subheading 3402.20.5000, HTSUSA, if not. *See* Explanatory Note amending supplement five at 521 (Feb. 1998).

Holding:

The toiletry bag is classified in subheading 4202.92.4500, HTSUSA, which provides for other travel, sports and similar bags. The applicable general column rate of duty is 20 percent *ad valorem*.

There are no procedural requirements for entry into the customs territory of the domestic status eye care cream, facial skin moisturizer, face cream and face cleanser when packaged within the toiletry bag and cardboard box. The cardboard box is classified and dutiable with the toiletry bag as GRI 5(b) packing material if of foreign origin. If it is of U.S. origin, the box remains classified with the toiletry bag, but would be entitled to the exemption in the second proviso to 19 U.S.C. 81c(a).

NY A80575 is hereby modified.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF "SOBAKAWA™ PILLOW" FLAXSEED EYE MASK

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of the "Sobakawa™ pillow" flaxseed eye mask, under the Harmonized Tariff Schedule of the United States (HTSUS). Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received April 2, 1999.

FOR FURTHER INFORMATION CONTACT: Michael McManus, General Classification Branch, Office of Regulations and Rulings (202) 927–2326.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke NY B86429 to reflect the proper

classification of the "Sobakawa™ pillow" flaxseed eye mask in subheading 1404.90.00, HTSUS, as "Vegetable products not elsewhere specified or included."

In NY B86429, dated June 23, 1997, Customs ruled that the "SOBAKAWA™ Pillow" flaxseed eye mask was classified in subheading 3005.90.5090, HTSUS, the residual provision for wadding, gauze, bandages and similar articles. NY B86429 is set forth as Attachment A to this document.

In Volume 32, Number 46 of the CUSTOMS BULLETIN, published on November 18, 1998, Customs stated its intention to revoke New York Ruling Letter B86429 and classify this merchandise in subheading 1204.00.00, HTSUS as flaxseed. Upon further review and consideration of this matter, we have determined that this merchandise is not properly classified in subheading 1204.00.00, HTSUS.

It is now Customs position that this product should be classified in subheading 1404.90.00, HTSUS, as "Vegetable products not elsewhere specified or included." The product is not a "similar article" to those enumerated in heading 3005, HTSUS, nor is the product for medical, surgical, dental or veterinary purposes, as is true of articles classified in heading 3005, HTSUS. The essential character of the product is provided by the flaxseed. However, because it is a composite good put up for specific use rather than general use, it is classified in subheading 1404.90.00, HTSUS, the provision for "Vegetable products not elsewhere specified or included". Proposed Headquarters Ruling Letter (HQ) 962310, revoking NY B86429, is set forth as Attachment B to this document. Before taking this action, we will give consideration to any written comments timely received.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: February 11, 1999.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
New York, NY, June 23, 1997.

CLA–2–30:RR:NC:2:238 B86429
Category: Classification
Tariff No. 3005.90.5090

MS. CECILIA CASTELLANOS
WESTERN OVERSEAS CORPORATION
PO. Box 90099
Long Beach, CA 90809–1345

Re: The tariff classification of a Flaxseed Eye Mask from China.

DEAR MS. CASTELLANOS:

In your letter dated June 12, 1997, on behalf of your client, Yanko Herb, Inc., you requested a tariff classification ruling.

The subject product, described on the accompanying insert as a "SOBAKAWA™ Pillow" flaxseed eye mask, consists of a small, sealed pouch, which is constructed from woven fabric and filled with flaxseeds (7.5 oz.). According to the instructions on the insert, the individual, after lying down or reclining, places the pouch, mask-like, across the bridge of the nose and over the eyes, in order to rest and soothe tired, irritated, puffy eyes. It can also be chilled in a freezer, prior to use. The product is put up for retail sale in a sealed polybag. The sample is being returned, pursuant to your request.

The applicable subheading for the subject product will be 3005.90.5090, Harmonized Tariff Schedule of the United States (HTS), which provides for: "Wadding, gauze, bandages and similar articles (for example, dressings, adhesive plasters, poultices), impregnated or coated with pharmaceutical substances or put up in forms or packings for retail sale for medical, surgical, dental or veterinary purposes: Other: Other: Other." The rate of duty will be free.

This merchandise may be subject to the requirements of the Federal Food, Drug, and Cosmetic Act, which is administered by the U.S. Food and Drug Administration. You may contact them at 5600 Fishers Lane, Rockville, MD 20857, telephone number (301) 443–6553.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Cornelius Reilly at 212–466–5770.

GWENN KLEIN KIRSCHNER,
Chief, Special Products Branch,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 962310 MGM
Category: Classification
Tariff No. 1404.90.00

MS. CECILIA CASTELLANOS
EXECUTIVE VICE PRESIDENT
WESTERN OVERSEAS CORPORATION
P.O. Box 90099
Long Beach, CA 90809–0099

Re: "SOBAKAWA™ Pillow" Flaxseed Eye Mask; Revocation of NY B86429.

DEAR MS. CASTELLANOS:

This is in reference to New York Ruling Letter (NY) B86429, issued to you on June 23, 1997, in response to your letter of June 12, 1997, on behalf of Yanko Herb, Incorporated. In NY B86429, Customs ruled that the "SOBAKAWA™ Pillow" flaxseed eye mask was classified in subheading 3005.90.5090, Harmonized Tariff Scedule of the United States (HTSUS), the residual provision for wadding, gauze, bandages and similar articles.

In Volume 32, Number 46 of the CUSTOMS BULLETIN, published on November 18, 1998, Customs stated its intention to revoke New York Ruling Letter B86429 and classify this merchandise in subheading 1204.00.00, HTSUS, as flaxseed. Upon further review and consideration of this matter, we have determined that this merchandise is not properly classified in subheading 1204.00.00, HTSUS.

Facts:

The "SOBAKAWA™ Pillow" consists of a small, sealed pouch, which is constructed from woven fabric and filled with flaxseeds (7.5 oz.). According to the instructions on the insert, the individual, after lying down or reclining, places the pouch, mask-like, across the bridge of the nose and over the eyes, in order to rest and soothe the eyes. It can also be chilled in a freezer prior to use. The product is put up for retail sale in a sealed polybag.

Issue:

What is the proper tariff classification of the "SOBAKAWA™ Pillow" flaxseed eye mask?

Law and Analysis:

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in their appropriate order. In understanding the language of the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. *See,* T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

Heading 3005, HTSUS, provides as follows:

> 3005 Wadding, gauze, bandages and similar articles (for example, dressings, adhesive plasters, poultices), impregnated or coated with pharmaceutical substances or put up in forms or packings for retail sale for medical, surgical, dental or veterinary purposes.

Under the rule of *ejusdem generis*, the phrase "similar articles" is limited to goods which "possess the essential characteristics or purposes that unite the articles enumerated *eo nomine*." *Totes, Inc. v. U.S.*, 69 F.3d 495, 498 (Fed. Cir. 1995) (citing *Sports Graphics, Inc. v. United States*, 24 F.3d 1390 (Fed. Cir. 1994)). The characteristic which unites the exem-

plars of this heading is their direct application to an ailing portion of the body. The "SOBAKAWA™ Pillow" flaxseed eye mask is not designed or marketed for such a purpose and is therefore not "a similar article." Furthermore, this heading is limited to items which are for "medical, surgical, dental or veterinary purposes." While the instant product does purport to soothe the eyes, such action does not amount to medical treatment of an ailment, thus it is not properly classified in heading 3005, HTSUS.

Neither does any other heading describe the "SOBAKAWA™ Pillow" flaxseed eye mask. Where goods cannot be classified according to GRI 1, the remaining GRIs are applied in order. GRI 2 (b) states that "any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances * * * The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3." GRI 3 (b) states that goods which are *prima facie* classifiable under two or more headings and are made up of different components shall be classified as if they consisted of the material or component which gives them their essential character.

Factors which determine essential character may include bulk, quantity, weight, value, or the role of a constituent material in relation to the use of the goods. Explanatory Note VIII to GRI 3. Here, the flaxseeds provide the greater part of the item's bulk and weight. In addition, they are understood to perform the primary soothing function. Thus, the essential character of the "SOBAKAWA™ Pillow" flaxseed eye mask is found in the flaxseeds.

The Harmonized System Committee (HSC) of the World Customs Organization (formerly the Customs Co-operation Council) has issued a report regarding the classification of "certain substances or materials put up in certain forms for specific use, rather than general use" at its 22nd Session in November of 1998. HSC Nov. 98 42.444. The decisions found in this report indicate that where a composite article, put up for a specific use, is classified according to the material which imparts the essential character to the merchandise, the merchandise is to be classified as an *article* of the material rather than as the primary form of the material. The Committee Report further stated that "the Committee had not decided on a general principle which would cover the classification of *all* products put up in certain forms for specific uses." These decisions did not result in an amendment to the Explanatory Notes nor in the issuance of a classification opinion

Decisions of the HSC are advice and guides to the interpretation of the Harmonized Schedule. The decisions are not binding, but Customs considers that they often provide valuable insight into how the HSC views certain provisions. Decisions which are merely given in the report are accorded relatively less weight than those decisions for which a classification opinion is issued and added to the Compendium of Classification Opinions or those decisions embodied as an amendment to the Explanatory Notes. *See*, T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

There is no precedent which directly addresses classification of composite products put up for specific uses, however the Court of International Trade has decided the classification of a product somewhat analogous to the "Anti-Stress Eye Pillow." *Pillowtex Corp. v. U.S.*, 983 F.Supp 188 (C.I.T. 1997). In *Pillowtex*, the court classified comforters which consisted of an outer shell of woven cotton and stuffing of down. In choosing the appropriate subheading, the court considered classification as a "comforter of cotton" or as a comforter of "other" than cotton. The court referred to the principles of GRI 3(b) in holding that it would be improper to classify the comforter as an "article of cotton" because its essential character was imparted by the down stuffing. Despite the down stuffing supplying the essential character, there is no mention of classification as down in its primary form. This suggests that the court views composite products for specific uses in a manner congruent with the HSC, that is, as articles of the material which imparts the essential character.

Thus it appears that the "SOBAKAWA™ Pillow" flaxseed eye mask is to be classified as an article of the material from which it draws its essential character. As there is no provision in the HTSUS for "articles of flaxseed," the "SOBAKAWA™ Pillow" flaxseed eye mask falls in heading 1404, HTSUS, as a "Vegetable product not elsewhere specified or included."

Heading 1404, HTSUS, is not limited only to raw vegetable materials. HQ 959719, dated October 21, 1997, classified decorative stickers consisting of dried flowers vacuum sealed between discs of plastics with an adhesive coating on one side. It was held that the dried flowers provided the essential character of the article and it was therefore classified in heading 1404.90.00, HTSUS.

Holding:

The "SOBAKAWA™ Pillow" flaxseed eye mask is classified in subheading 1404.90.00, HTSUS.

NY B86429 is REVOKED.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF RULING LETTERS RELATING TO HEATING AND COOLING PADS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke two rulings pertaining to the tariff classification of heating and cooling pads, under the Harmonized Tariff Schedule of the United States (HTSUS). Comments are invited on the correctness of the proposed rulings.

DATE: Comments must be received on or before April 2, 1999.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulation and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the same address.

FOR FURTHER INFORMATION CONTACT: Michael McManus, General Classification Branch, (202) 927–2326.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke two rulings pertaining to the tariff classification of heating and cooling pads.

In New York Ruling Letter (NY) A83830, issued May 31, 1996, Customs ruled that "PitPacs" hot and cold pads were classified in subheading 3005.90.5090, HTSUS. In NY 813748, issued August 29, 1995,

Customs ruled that the "Magic Bag" hot and cold pad was classified in subheading 3005.90.5090, HTSUS. NY A83830 and NY 813748 are set forth as Attachments A and B, respectively.

In Volume 32, Number 48 of the CUSTOMS BULLETIN, published on December 2, 1998, Customs stated its intention to revoke NY A83830 and classify the "PitPacs" heating and cooling pads in subheading 1212.99.00, HTSUS, as "fruit stones," and to revoke NY 813748 and classify the "Magic Bag" heating and cooling pad in subheading 1004.00.00, HTSUS, as "oats." Upon further review and consideration of this matter, we have determined that the "PitPacs" heating and cooling pads are not properly classified in subheading 1212.99.00, HTSUS, nor is the "Magic Bag" properly classified in subheading 1004.00.00, HTSUS.

It is now Customs position that these products should be classified in subheading 1404.90.00, HTSUS, as "Vegetable products not elsewhere specified or included." These products are not "similar article[s]" to those enumerated in heading 3005, HTSUS, nor are the products for medical, surgical, dental or veterinary purposes, as is true of articles classified in heading 3005, HTSUS. Furthermore, they are composite goods put up for a specific use, thus they are classified as articles of the material which supplies the item's essential character. The essential character of these products is supplied by the filling material, that is, the cherry pits and oats. Proposed HQ 961089, revoking NY A83830, and HQ 962353, revoking NY 813748, are set forth as Attachments C, and D, respectively. Before taking this action, we will give consideration to any written comments timely received.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: February 12, 1999.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, May 31, 1996.

CLA–2–30:RR:NC:FC:238 A83830
Category: Classification
Tariff No. 3005.90.5090

MR. JOHN SVEUM
TOWER GROUP INTERNATIONAL, INC.
P.O. Box 269
Sweetgrass, MT 59484

Re: The tariff classification of "PitPacs" Hot & Cold Comfort Pacs, from Canada.

DEAR MR. SVEUM:

In your letter dated May 13, 1996, on behalf of your client, The Cherry Tree Ltd., you requested a tariff classification ruling.

The submitted sample, designated as "PitPac", consists of a 9″ x 9″ cloth bag, constructed from 100% cotton fabric, into which are sewn washed-and-dried cherry pits. According to the descriptive literature supplied, the subject product has many health care applications, and, upon heating in a microwave oven, standard oven or double boiler, or placing in a freezer (for use as a cold compress), can be used to reduce muscle tension, aches and pains, ease arthritic conditions, migraine headaches, toothaches, etc. The descriptive literature also indicates that this product comes in a 4.5″ x 18″ size.

The applicable subheading for the subject product will be 3005.90.5090, Harmonized Tariff Schedule of the United States (HTS), which provides for: "Wadding, gauze, bandages and similar articles (for example, dressings, adhesive plasters, poultices), * * * put up in forms or packings for retail sale for medical, surgical, dental or veterinary purposes: Other: Other: Other." The general rate of duty will be free.

This merchandise may be subject to the regulations of the Food and Drug Administration. You may contact them at 5600 Fishers Lane, Rockville, Maryland 20857, telephone number (301) 443–6553.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist C. Reilly at 212–466–5770.

ROGER J. SILVESTRI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, August 29, 1995.

CLA–2–30:S:N:N7:238 813748
Category: Classification
Tariff No. 3005.90.5090

MR. ROBERT F. DOMEY
FRITZ COMPANIES, INC.
100 Walnut Street
P.O. Box 2874
Champlain, NY 12919–2874

Re: The tariff classification of Magic Bag® from Canada.

DEAR MR. DOMEY:

In your letter dated August 14, 1995, on behalf of your client, Creations Magiques C.M. Inc., you requested a tariff classification ruling.

The submitted samples, one square-shaped and the other rectangle-shaped, consist of bag or sack-like devices which are used to transfer stored heat (after heating in a microwave oven) or apply cold (after placing in a freezer) onto a body part or limb for about half an hour. Both samples are designated by the trade name Magic Bag®. Each "bag" consists of a shell or envelope which is constructed from 100% cotton fabric, and which, in turn, is filled with a load of cereal (oat) grains. The product is indicated for use to reduce swelling, and to relieve aches and pains, among other things. As submitted, each sample is put up packed for retail sale.

The applicable subheading for Magic Bag® will be 3005.90.5090, Harmonized Tariff Schedule of the United States (HTS), which provides for: "Wadding, gauze, bandages and similar articles * * * put up in forms or packings for retail sale for medical, surgical, dental or veterinary purposes: Other: Other: Other." The rate of duty will be free.

This merchandise may be subject to the regulations of the Food and Drug Administration. You may contact them at 5600 Fishers Lane, Rockville, Maryland 20857, telephone number (301) 443–6553.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 961089 MGM
Category: Classification
Tariff No. 1404.90.00

MR. JOHN SVEUM
TOWER GROUP INTERNATIONAL, INC.
P.O. Box 269
Sweetgrass, MT 59484

Re: "PitPacs" Heating and Cooling Pads; Revocation of NY A83830.

DEAR MR. SVEUM:

This office has determined that New York Ruling Letter (NY) A83830, issued to you on May 31, 1996, in response to your letter of May 13, 1996, on behalf of The Cherry Tree Ltd., requesting a ruling regarding the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of "PitPacs" heating and cooling pads is in error. Therefore, this ruling revokes NY A83830 and sets forth the correct classification of "PitPacs" heating and cooling pads.

In Volume 32, Number 48 of the CUSTOMS BULLETIN, published on December 2, 1998, Customs stated its intention to revoke NY A83830 and classify this merchandise in subheading 1212.99.00, HTSUS, as fruit stones. Upon further review and consideration of this matter, we have determined that this merchandise is not properly classified in subheading 1212.99.00, HTSUS.

Facts:

The "PitPacs" heating and cooling pads consist of cherry pits, which have been washed and dried, and encased in a cotton bag. The bag may be 9″ x 9″, or 4.5″ x 18″. The descriptive literature which accompanies the product indicates that it may be heated in a microwave oven, standard oven, or double boiler, or cooled in a freezer. In its heated or cooled state, it is applied to the body to reduce tension, aches, and pains.

Issue:

Whether "PitPacs" heating and cooling pads are classified in heading 3005, HTSUS, as wadding, gauze, bandages and similar articles?

If not, does any other heading describe "PitPacs" heating and cooling pads?

If not, what material imparts the essential character to "PitPacs" heating and cooling pads?

Law and Analysis:

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs. In understanding the language of the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. *See*, T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

In NY A83830, dated May 31, 1996, this article was classified in heading 3005, HTSUS. This heading provides as follows:

> 3005 Wadding, gauze, bandages and similar articles (for example, dressings, adhesive plasters, poultices), impregnated or coated with pharmaceutical substances or put up in forms or packings for retail sale for medical, surgical, dental or veterinary purposes.

Under the rule of *ejusdem generis*, the phrase "similar articles" is limited to goods which "possess the essential characteristics or purposes that unite the articles enumerated *eo nomine*." *Totes, Inc. v. U.S.*, 69 F.3d 495, 498 (Fed. Cir. 1995) (citing *Sports Graphics, Inc. v. United States*, 24 F.3d 1390 (Fed. Cir. 1994)). The characteristic which unites the exemplars of this heading is their direct application to an open wound or to irritated skin. Furthermore, this heading is limited to items which are for "medical, surgical, dental or veterinary purposes." While the instant product does purport to reduce tension, aches, and pains, the "PitPacs" heating and cooling comfort pad is more in the nature of a general tonic rather than an item with a definable medical purpose. Thus it is not properly classified in heading 3005, HTSUS.

Neither does any other heading of the nomenclature describe the "PitPacs" heating and cooling pad. Where goods cannot be classified according to GRI 1, the remaining GRIs are applied in order. GRI 2(b) states that "any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances * * * The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3." GRI 3 (b) states that goods which are *prima facie* classifiable under two or more headings and consist of different materials or are made up of different components shall be classified as if they consisted of the material or component which gives them their essential character.

Factors which determine essential character may include bulk, quantity, weight, value, or the role of a constituent material in relation to the use of the goods. Explanatory Note VIII to GRI 3. Here, the cherry pits provide the greater part of the item's bulk and weight. In addition, the cherry pits are not highly conductive of temperature, thus they retain the heat or cold for a period of time after removal from the heating source or freezer. Thus, the essential character of the "PitPacs" heating and cooling pad is found in the cherry pits.

The Harmonized System Committee (HSC) of the World Customs Organization (formerly the Customs Co-operation Council) has issued a report regarding the classification of "certain substances or materials put up in certain forms for specific use rather than general use" at its 22nd Session in November of 1998. HSC Nov. 98, 42.444. The decisions found in this report indicate that where a composite article, put up for a specific use, is classified according to the material which imparts the essential character to the merchandise, the

merchandise is to be classified as an *article* of the material rather than as the primary form of the material. The Committee Report further stated that "the Committee had not decided on a general principle which would cover the classification of *all* products put up in certain forms for specific uses." These decisions did not result in an amendment to the Explanatory Notes nor in the issuance of a classification opinion

Decisions of the HSC are advice and guides to the interpretation of the Harmonized Schedule. The decisions are not binding, but Customs considers that they often provide valuable insight into how the HSC views certain provisions. Decisions which are merely given in the report are accorded relatively less weight than those decisions for which a classification opinion is issued and added to the Compendium of Classification Opinions or those decisions embodied as an amendment to the Explanatory Notes. *See*, T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

There is no precedent which directly addresses classification of composite products put up for specific uses, however the Court of International Trade has decided the classification of a product somewhat analogous to the "PitPacs" heating and cooling pad. *Pillowtex Corp. v. U.S.*, 983 F.Supp 188 (C.I.T. 1997). In *Pillowtex*, the court classified comforters which consisted of an outer shell of woven cotton and stuffing of down. In choosing the appropriate subheading, the court considered classification as a "comforter of cotton" or as a comforter of "other" than cotton. The court referred to the principles of GRI 3(b) in holding that it would be improper to classify the comforter as an "article of cotton" because its essential character was imparted by the down stuffing. Despite the down stuffing supplying the essential character, there is no mention of classification as down in its primary form. This suggests that the court views composite products for specific uses in a manner congruent with the HSC, that is, as articles of the material which imparts the essential character.

Thus it appears that the "PitPacs" heating and cooling pad is to be classified as an article of the material from which it draws its essential character. As there is no provision in the HTSUS for "articles of cherry pits," the "PitPacs" heating and cooling pad falls in heading 1404, HTSUS, as a "Vegetable product not elsewhere specified or included."

Heading 1404, HTSUS, is not limited only to raw vegetable materials. HQ 959719, dated October 21, 1997, classified decorative stickers consisting of dried flowers vacuum sealed between discs of plastics with an adhesive coating on one side. It held that the dried flowers provided the essential character of the article and the merchandise was therefore classified in heading 1404.90.00, HTSUS.

Holding:

The "PitPacs" heating and cooling pad is classified in subheading 1404.90.00, HTSUS. NY A83830 is revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 962353 MGM
Category: Classification
Tariff No. 1404.90.00

MR. ROBERT F. DOMEY
FRITZ COMPANIES, INC.
100 Walnut Street
P.O. Box 2874
Champlain, NY 12919–2874

Re: The "Magic Bag" heating and cooling pad; Revocation of NY 813748.

DEAR MR. DOMEY:

This office has determined that New York Ruling Letter (NY) 813748, issued to you on August 29, 1995, in response to your letter of August 14, 1995, on behalf of Creations Magiques C.M. Inc., requesting a ruling regarding the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of the "Magic Bag" is in error.

In Volume 32, Number 48 of the CUSTOMS BULLETIN, published on December 2, 1998, Customs stated its intention to revoke NY 813748 and classify this merchandise in subheading 1004.00.00, HTSUS, as oats. The only comment received was your letter, received December 2, 1998, which discussed the processes to which the oat grains are subjected prior to being encased in fabric and the role of the "Magic Bag" in pain relief. Upon further review and consideration of this matter, we have determined that this merchandise is not properly classified in subheading 1004.00.00, HTSUS.

Facts:

The "Magic Bag" is a square or rectangle shaped bag which consists of cereal (oat) grains enclosed within 100% cotton fabric. The bags are designed to be heated in a microwave oven or cooled in a freezer, then applied to the body so as to heat or cool an area of the body. The product is indicated for use on the body in reduction of swelling and relief of aches and pains.

Issue:

Whether "Magic Bags" heating and cooling pads should be classified in heading 3005, HTSUS, as wadding, gauze, bandages and similar articles?

If not, are "Magic Bags" heating and cooling pads described by any other heading?

If not, what material imparts the essential character to "Magic Bags" heating and cooling pads?

Law and Analysis:

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs. In understanding the language of the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. *See,* T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

In NY 813748, dated August 29, 1995, the "Magic Bag" was classified in heading 3005, HTSUS. This heading provides as follows:

> 3005 Wadding, gauze, bandages and similar articles (for example, dressings, adhesive plasters, poultices), impregnated or coated with pharmaceutical substances or put up in forms or packings for retail sale for medical, surgical, dental or veterinary purposes.

Under the rule of *ejusdem generis*, the phrase "similar articles" is limited to goods which "possess the essential characteristics or purposes that unite the articles enumerated *eo nomine*." *Totes, Inc. v. U.S.*, 69 F.3d 495, 498 (Fed. Cir. 1995) (citing *Sports Graphics, Inc. v. United States*, 24 F.3d 1390 (Fed. Cir. 1994)). The characteristic which unites the exemplars of this heading is their direct application to an open wound or irritated skin. Furthermore, this heading is limited to items which are for "medical, surgical, dental or veterinary purposes." The claimed reduction of swelling and relief of aches and pains provided by this product does not rise to the level of a medical treatment. Further, the requestor has not presented any evidence which suggests that physicians recommend the "Magic Bag" to their patients. Thus it is not properly classified in heading 3005, HTSUS.

Neither does any other heading describe the "Magic Bag," heating and cooling pad. Where goods cannot be classified according to GRI 1, the remaining GRIs are applied in order. GRI 2(b) states that "any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances * * * The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3." GRI 3(b) states that goods which are *prima facie* classifiable under two or more headings and consist of different materials or are made up of different components shall be classified as if they consisted of the material or component which gives them their essential character.

Factors which determine essential character may include bulk, quantity, weight, value, or the role of a constituent material in relation to the use of the goods. Explanatory Note VIII to GRI 3. Here, the cereal grain provides the greater part of the item's bulk and weight. In addition, it is the grain which primarily retains the heat or cold for a period of time after removal from the heating source or freezer. Thus, the essential character of the "Magic Bag" cooling and heating pad is found in the cereal oat grain.

The Harmonized System Committee (HSC) of the World Customs Organization (formerly the Customs Co-operation Council) has issued a report regarding the classification of "certain substances or materials put up in certain forms for specific use, rather than general use" at its 22nd Session in November of 1998. HSC Nov. 98, 42.444. The decisions found in this report indicate that where a composite article, put up for a specific use, is classified according to the material which imparts the essential character to the merchandise, the merchandise is to be classified as an *article* of the material rather than as the primary form of the material. The Committee Report further stated that "the Committee had not decided on a general principle which would cover the classification of *all* products put up in certain forms for specific uses." These decisions did not result in an amendment to the Explanatory Notes nor in the issuance of a classification opinion

Decisions of the HSC are advice and guides to the interpretation of the Harmonized Schedule. The decisions are not binding, but Customs considers that they often provide valuable insight into how the HSC views certain provisions. Decisions which are merely given in the report are accorded relatively less weight than those decisions for which a classification opinion is issued and added to the Compendium of Classification Opinions or those decisions embodied as an amendment to the Explanatory Notes. *See*, T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

There is no precedent which directly addresses classification of composite products put up for specific uses, however the Court of International Trade has decided the classification of a product somewhat analogous to the "Magic Bag" *Pillowtex Corp. v. U.S.*, 983 F.Supp 188 (C.I.T. 1997). In *Pillowtex*, the court classified comforters which consisted of an outer shell of woven cotton and stuffing of down. In choosing the appropriate subheading, the court considered classification as a "comforter of cotton" or as a comforter of "other" than cotton. The court referred to the principles of GRI 3(b) in holding that it would be improper to classify the comforter as an "article of cotton" because its essential character was imparted by the down stuffing. Despite the down stuffing supplying the essential character, there is no mention of classification as down in its primary form. This suggests that the court views composite products for specific uses in a manner congruent with the HSC, that is, as articles of the material which imparts the essential character.

Thus it appears that the "Magic Bag" heating and cooling pad is to be classified as an article of the material from which it draws its essential character. As there is no provision in the HTSUS for "articles of cereal" or "articles of oats," the "Magic Bag" heating and cooling pad falls in heading 1404, HTSUS, as a "Vegetable product not elsewhere specified or included."

Heading 1404, HTSUS, is not limited only to raw vegetable materials. HQ 959719, dated October 21, 1997, classified decorative stickers consisting of dried flowers vacuum sealed between discs of plastics with an adhesive coating on one side. It held that the dried flowers provided the essential character of the article and the merchandise was therefore classified in heading 1404.90.00, HTSUS.

Holding:

The "Magic Bag" cooling and heating pad is classified in subheading 1404.90.00, HTSUS, which provides for "Vegetable products not elsewhere specified or included."

NY 813748 is revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

MODIFICATION OF A RULING LETTER RELATING TO HEATING AND COOLING PADS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of heating and cooling pads, under the Harmonized Tariff Schedule of the United States (HTSUS). Notice of the proposed revocation was published December 2, 1998, in the CUSTOMS BULLETIN.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after May 3, 1999.

FOR FURTHER INFORMATION CONTACT: Michael McManus, General Classification Branch, (202) 927–2326.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 2, 1998, Customs published a notice in the CUSTOMS BULLETIN, Volume 32, Number 48, proposing to modify New York Ruling Letter (NY) 806312, dated February 16, 1995, which classified the "Cool Paks" heating and cooling pads in subheading 3005.90.50, HTSUS, the provision for "Wadding, gauze, bandages and similar articles (for example dressings, adhesive plasters, poultices) impregnated or coated with pharmaceutical substances or put up in forms or pack-

ings for retail sale for medical, surgical, dental or veterinary purposes." No comments were received in response to this notice.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is to modifying NY 806312 to reflect the proper classification of the "Cool Paks" heating and cooling pads in subheading 3926.90.98, HTSUS, the residual provision for other articles of plastic. HQ 962353, modifying NY 806312, is set forth as the attachment to this document.

Publications of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: February 11, 1999.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, February 11, 1999.

CLA–2 RR:CR:GC 962352 MGM
Category: Classification
Tariff No. 3926.90.98

MR. DALE MARTEL
TREKWARE DEVELOPMENTS LTD.
1613 Passageview Dr.
Campbell River, BC
Canada V9W6L2

Re: "Cool Ties," "Cool Bands," and "Cool Paks" cooling pads; Modification of NY 806312.

DEAR MR. MARTEL:

This letter is in reference to New York Ruling Letter (NY) 806312, issued to you on February 16, 1995, in response to your letter of January 9, 1995, requesting a ruling regarding the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of "Cool Ties," "Cool Bands," and "Cool Paks." "Cool Paks" were classified in subheading 3005.90.50, HTSUS, as wadding, gauze, bandages and similar articles.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed modification of NY 806312 was published on December 2, 1998, in the CUSTOMS BULLETIN, Volume 32, Number 48. No comments were received in response to that notice.

Facts:

The "Cool Paks" are rectangular pads. The larger pad measures approximately 10.75 inches by 8.5 inches, while the smaller pad measures approximately 9.5 by 4.25 inches.

They are designed to be used as compresses on any part of the body. These items are made of polyacrylamide crystals enclosed within woven fabric. When the articles are soaked in water, the crystals absorb the liquid, expanding to many times their original size. When placed against the skin, the coolness of the absorbed water and the action of evaporation of moisture from the skin bring about a cooling effect. The "Cool Paks" may also be warmed in a microwave oven and used to provide heat treatment to an area of the body.

Issue:

Whether "Cool Paks" should be classified in heading 3005, HTSUS, as wadding, gauze, bandages and similar articles; heading 3926, HTSUS, as other articles of plastics; or one of the headings of Section XI, HTSUS, as textiles?

Law and Analysis:

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs. In understanding the language of the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. *See*, T.D. 89-80, 54 Fed. Reg. 35127 (August 23, 1989).

In NY 806312, dated February 16, 1995, the "Cool Pak" was classified in heading 3005, HTSUS. This heading provides as follows:

> 3005 Wadding, gauze, bandages and similar articles (for example, dressings, adhesive plasters, poultices), impregnated or coated with pharmaceutical substances or put up in forms or packings for retail sale for medical, surgical, dental or veterinary purposes.

Under the rule of *ejusdem generis*, the phrase "similar articles" is limited to goods which "possess the essential characteristics or purposes that unite the articles enumerated *eo nomine*." *Totes, Inc. v. U.S.*, 69 F.3d 495, 498 (Fed. Cir. 1995) (citing *Sports Graphics, Inc. v. United States*, 24 F.3d 1390 (Fed. Cir. 1994)). The characteristic which unites the exemplars of this heading is their direct application to an ailing portion of the body. Furthermore, this heading is limited to items which are for "medical, surgical, dental or veterinary purposes." The cooling effect provided by these products may increase comfort, but does not rise to the level of a medical treatment. Similarly, that the "Cool Pak" may be used to provide heat treatment to an area of the body is not sufficient to qualify it as a medical treatment. Thus it is not properly classified in heading 3005, HTSUS.

Neither does any other heading of the nomenclature describe the "Cool Paks" cooling devices. Where goods cannot be classified according to GRI 1, the remaining GRIs are applied in order. GRI 2(b) states that "any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances * * * The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3." GRI 3(b) states that goods which are *prima facie* classifiable under two or more headings and consist of different materials or are made up of different components shall be classified as if they consisted of the material or component which gives them their essential character. Thus, the "Cool Paks" cooling devices are classified in either heading 3926, HTSUS, as other articles of plastics, or one of the headings of Section XI, HTSUS, as textiles.

Factors which determine essential character may include bulk, quantity, weight, value, or the role of a constituent material in relation to the use of the goods. Explanatory Note VIII to GRI 3. Here, the polyacrylamide crystals provide the greater part of the item's bulk and weight. In addition, the polyacrylamide crystals retain and then release moisture, thereby enabling the cooling effect of these products. Thus, the essential character of the

"Cool Paks" cooling devices is found in the polyacrylamide crystals and it is classified in heading 3926, HTSUS.

Within heading 3926, HTSUS, none of the *eo nomine* provisions include polyacrylamide crystals, thus this merchandise falls in the residual provision.

Holding:

The "Cool Paks" cooling devices are classified in subheading 3926.90.98, HTSUS, which provides for other articles of plastics, other, other. General Note 12, HTSUS, continues to govern the dutiable treatment of this merchandise under the North American Free Trade Agreement.

NY 806312 is modified. In accordance with 19 U.S.C. §1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

WITHDRAWAL OF PROPOSED REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF A TRAVEL DOCUMENT HOLDER

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of withdrawal of proposed revocation of tariff classification ruling letter.

SUMMARY: This notice advises interested parties that Customs is withdrawing its proposal to revoke a ruling letter pertaining to the tariff classification of a travel document holder. Notice of the proposed modification was published on December 23, 1998, in the CUSTOMS BULLETIN, pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057 (1993)).

EFFECTIVE DATE: March 3, 1999.

FOR FURTHER INFORMATION CONTACT: Greg Deutsch, Office of Regulations and Rulings, Textile Branch (202) 927–2302.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057 (1993)), on December 23, 1998, Customs published a notice in the CUSTOMS BULLETIN, Volume 32, Number 51, proposing to revoke Port Ruling Letter (PD) C84151, issued

February 26, 1998, which classified a travel document holder in subheading 4202.92.4500, of the Harmonized Tariff Schedule of the United States Annotated. Three comments were received in response to this notice. At this time, we have determined that the merchandise at issue should continue to be classified in accordance with PD C84151. Therefore, this notice advises interested parties that Customs is withdrawing its proposal to revoke PD C84151.

Dated: February 11, 1999.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

U.S. Customs Service

Proposed Rulemaking

19 CFR Parts 4, 101, and 192

RIN 1515–AC42

AUTOMATED EXPORT SYSTEM (AES)

AGENCY: Customs Service, Treasury.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Automated Export System (AES) is an electronic reporting system jointly developed by the Bureau of the Census (Census) and Customs that allows exporters to electronically transmit commodity information contained on Shipper's Export Declarations and sea carriers to electronically transmit outbound vessel manifest information. A general description of how AES works, including the application, qualification, and certification procedures for exporters and sea carriers is being proposed in a document issued by the Bureau of the Census in today's Federal Register. This document proposes to amend the Customs Regulations to cross-reference the Census proposed regulations. Also, this document proposes to set forth criteria under which Customs will determine whether to approve an exporter for the option to transmit commodity information through AES after a carrier has left the United States (post-departure). This document also sets forth the appeal procedures for AES exporters if Customs denies the exporter the post-departure option; or, if Customs approves the post-departure option for the AES exporter, the grounds for revocation of the use of the option and the appeal procedures if Customs revokes the use of that option.

Exporters that utilize the AES can expect to benefit from fewer delays in the processing of export information by Customs due to missing paperwork; fewer, but faster inspections of export shipments; and reduced administration costs due to automation.

DATES: Comments must be received on or before April 3, 1999.

ADDRESS: Written comments should be addressed to the U.S. Customs Service, Office of Regulations and Rulings, Regulations Branch, Suite 3000, 1300 Pennsylvania Avenue, NW, Washington, D.C. 20229. Com-

ments submitted may be inspected at the U.S. Customs Service, Office of Regulations and Rulings, Regulations Branch, Suite 3000, 1300 Pennsylvania Avenue, NW, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Maritza Castro, Office of Field Operations, Outbound Process, (703) 921–7465.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On October 9, 1998, Customs and the Bureau of the Census (Census) published a joint notice in the Federal Register (63 FR 54438) that informed the public of the current status of the Automated Export System (AES), an electronic reporting system jointly developed by Census and Customs that allows exporters to transmit commodity information contained on Shipper's Export Declarations (SEDs), and carriers to transmit outbound vessel manifest information. That notice informed the public of developments affecting the implementation of the AES and announced that Census and Customs would be developing regulations to implement provisions and requirements for filing export information electronically through the AES. Since the Background information contained in that notice fully recounts the development of the AES to date, it is incorporated here by reference.

AES Requirements in General

In a separate document published in today's Federal Register, the Bureau of the Census is proposing to set forth general requirements for the AES in the Census Regulations (chapter I of title 15 of the Code of Federal Regulations) at redesignated subpart E of part 30 (15 CFR part 30). Although Customs proposes in this document to cross-reference the Census Regulations that will provide for the AES, a general description of the AES follows.

(1) *Eligibility.* Participation in AES is voluntary. Regarding the submission of SEDs, AES allows exporters, agents, and service companies (collectively referred to as export commodity information filers) that are required to report commodity export information to electronically file such information on all export commodities regardless of the mode of transportation in which the commodities are being exported. *See*, proposed § 30.60(a) of the Census Regulations. Regarding outbound vessel manifest information, sea carriers will be eligible to electronically file outbound manifest information pursuant to the Sea Carrier's Module of AES proposed in this document and in the Census proposal. It is expected that modules will be created at a later date that will allow air carriers and rail carriers to electronically file outbound manifest information.

(2) *Application.* Export commodity information filers and sea carriers who wish to participate in AES may apply by filing a "Letter of Intent," that contains the information described in proposed § 30.60(b) of the Census Regulations. For export commodity information filers, the application will provide up to three electronic fil-

ing options (denominated as options 2–4) for the submission of commodity information, in addition to the present method of filing paper documents (denominated as option 1):

(a) *Filing Full Pre-Departure Information (Option 2).* Under this option, all commodity information is required to be transmitted by the export commodity information filer before the export of the merchandise;

(b) *Filing Partial Pre-Departure Information (Option 3).* Under this option, only fourteen (14) identified data elements of commodity information are required to be transmitted by the export commodity information filer prior to exportation. The remaining data elements of commodity information are to be transmitted within five (5) business days of the date of exportation; or

(c) *Filing with No Pre-Departure Information (Option 4).* This option is only available to approved exporters wanting to export qualifying commodities without submitting any pre-departure information. However, complete commodity information must be electronically filed within ten (10) business days of exportation. (Note that export commodity information filers other than exporters, such as agents and service companies, may not apply for this filing option. The meaning of exporter in this context will be defined by Census.)

(3) *Certification of AES Filers and Approval of Option 4 for Exporters.* The AES certification procedure generally provides that, following the processing of the Letter of Intent to participate in the AES, the prospective AES filer must perform an initial two-part communication test so that it can be ascertained whether the prospective filer's electronic system is capable of communicating with the AES; applicants will be tested for the ability to send and receive messages. For applicants applying for AES filing Options 2 or 3 or for electronic filing through the Sea Carrier's Module of AES, Customs and Census will make the determination of whether a particular export commodity information filer or sea carrier is qualified, and certify them to participate in AES. *See*, proposed § 30.62 of the Census Regulations. Once an export commodity information filer is qualified and certified to use either Option 2 or 3 as an AES participant, he may electronically file export commodity information without any further approval process. Similarly, once a sea carrier is qualified and certified to use the Sea Carrier's Module as an AES participant, it may electronically file outbound manifest information without any further approval process.

For exporters applying for Option 4 (post-departure) filing privileges, the application will be reviewed by a panel of participating partnership agencies for approval. (Agencies currently participating include Census, Customs, Bureau of Export Administration, Nuclear Regulatory Commission, and the Office of Foreign Assets Control.)

(4) *Responsibilities of participants in AES.* The responsibilities of participants include, for export commodity information filers, making timely transmissions of the required export data elements, as proposed in § 30.63 of the Census Regulations, and for sea carri-

er module filers, making timely transmissions of the messages proposed in § 4.76 of the Customs Regulations. Participants are also responsible, in accordance with the AES Trade Interface Requirements handbook, which will be posted to the Customs internet web site (www.customs.ustreas.gov) and will be available through the Customs Electronic Bulletin Board (703–921–6155), for responding to government-generated messages, making appropriate corrections or cancellations to previously transmitted information, and maintaining proper records concerning AES transactions. AES participants are subject to the same penalty provisions that apply to paper filers of SED and manifest information. *See*, proposed § 30.60 of the Census Regulations. If employing non-AES carriers or forwarders, an AES export commodity information filer will be responsible for identifying his status as an AES participant on transportation documents so that Customs and the carrier know that paper SEDs are not required because the filing was made via AES. *See*, proposed § 30.65 of the Census Regulations. AES participants will be required to comply with the recordkeeping requirements proposed in § 30.66 of the Census Regulations and any other applicable recordkeeping requirements that AES participants are subject to under existing law.

Customs Denial of Requests for Option 4 Filing Status; Revocation of Option 4 Filing Privileges Granted

Applicants requesting Option 4 filing status will have their applications reviewed by the panel of participating partnership agencies (identified above). (AERP participants who apply for Option 4 privileges will receive priority handling of their application. AERP participants should note their status on their Letter of Intent to ensure priority processing. Current participating AES-PASS filers will be grandfathered into Option 4.) Although each agency has its own evaluation criteria, a rejection by any of the agencies will result in non-acceptance of the application for Option 4 filing status. Following inter-agency review of applicants' credentials, Census will notify applicants in writing of their approval or denial within thirty (30) calendar days of receipt of the application.

Customs may deny an applicant's request for Option 4 filing status, based on any of 4 separate grounds. If Customs denies an applicant's request for Option 4 status, the applicant will receive a letter from Census specifying the grounds on which Customs bases its denial and setting forth the appeal procedures the applicant may use to challenge Customs decision.

Once approved for Option 4 privileges, Customs may revoke the privilege, based on any of 4 separate grounds. Such participants will be advised in writing by Customs of the basis for the revocation and may file an appeal to challenge Customs decision. In these cases, the AES filer will be allowed to continue filing under Option 4 until the administrative appeal process has been exhausted. However, Customs may revoke a participant's Option 4 privileges immediately in cases of intentional violations of any Customs law or when required by national security.

The Sea Carrier's Module

Since 1996, Customs has held a series of open meetings with representatives of the sea carrier industry to discuss methods of improving compliance with manifest regulations and to create electronic manifesting procedures that conform to the current business practices of the industry. As a result of these meetings, Customs is proposing to require sea carriers to electronically file booking information (*i.e.*, cargo reservation information) before the loading and departure of the sea carrier as part of the AES outbound manifesting procedures.

It is proposed that booking information be provided to Customs through AES as the information becomes available as far in advance as practical of the loading of the vessel. It is proposed that the booking information be provided not later than seventy-two (72) hours prior to departure of the vessel and that booking information received by the carrier later in time, *i.e.*, within seventy-two (72) hours of a vessel's departure, will be transmitted immediately as it becomes available. Customs will use this advanced booking information to screen shipments for enforcement targeting.

It is also proposed that when an AES sea carrier receives the actual freight, it will notify Customs via AES by transmitting a "Receipt of booking" message. Customs will then notify the AES carrier if Customs will examine the booked cargo before the cargo is to be loaded on the vessel. If the booked cargo is scheduled by Customs for examination, then the carrier will not load the cargo until Customs examines and releases the cargo. Not later than one day after a vessel departs, an AES carrier will notify Customs of the date and time of the departure of the vessel ("Departure" message).

Sea carriers will normally have ten (10) business days after the departure of the vessel to electronically file outbound vessel manifest information ("Manifest" message), except as otherwise provided for in §§ 4.75 and 4.84 of the Customs Regulations. Even though a sea carrier files an electronic manifest, if paper SEDs are submitted by filers of the export commodity information, participant sea carriers will be responsible for submitting those SEDs to Customs within four (4) business days after departure of the vessel, unless another time frame is specified in §§ 4.75 or 4.84 of the Customs Regulations. Upon written agreement with participant sea carriers, Customs and Census can provide for an alternative to the location filing requirement for paper SEDs set forth in § 4.75(b).

Filing outbound vessel manifest information electronically through AES will be treated by Customs as meeting the outward cargo declaration filing requirements (CF 1302–A) required by §§ 4.63 and 4.75 of the Customs Regulations, if the procedures set forth in the AES Trade Interface Requirements handbook are followed.

PROPOSED AMENDMENTS CONCERNING AES, CUSTOMS ADMINISTRATIVE PROCEDURES FOR OPTION 4 PRIVILEGES, AND THE SEA CARRIER'S TRANSPORTATION MODULE

In this document Customs is proposing to create a new § 4.76 describing the Sea Carrier's module of AES which cross-references the proposed Census Regulations on AES; and a new subpart 192 which generally describes AES, cross-references the proposed Census Regulations on AES, sets forth criteria under which Customs will determine whether to approve an exporter for the AES option to transmit commodity information after a carrier has left the United States (post-departure), sets forth appeal procedures for AES exporters if Customs denies the exporter the post-departure option, or, if Customs approves the post-departure option for the AES exporter, the grounds for revocation of the use of the option and the appeal procedures if Customs revokes the use of the option. Customs is also proposing to revise the authority citation for part 192 to more clearly show the statutory basis of Customs authority to collect and examine manifest and export data information.

Customs is also using this document as the vehicle to propose an amendment to the general provisions of Part 101 of the Customs Regulations to include a definition of the term "business days." While the term "business days" is used in this document in reference to filing times for sea carriers, the definition is proposed to have applicability wherever the term is used throughout the Customs Regulations (19 CFR).

A more detailed description of the proposed regulatory changes follow:

Proposed § 4.76

Proposed § 4.76 is entitled "Procedures and responsibilities of carriers filing outbound vessel manifest information via the AES." This section will provide that the Sea Carrier's Module of the AES allows sea carriers to submit required outbound vessel manifest data electronically. This section will cross-reference proposed subpart E of the Census Regulations (15 CFR Subpart E). Section 4.76 sets forth the types of messages sea carriers on the module will be required to transmit and the time frames for their transmission. Sea carriers certified to use the module and adhering to the procedures concerning the electronic submission of outbound vessel manifest information will meet the outward cargo declaration filing requirements (CF 1302–A) of §§ 4.63 and 4.75 of the Customs Regulations (19 CFR 4.63 and 4.75), except as otherwise provided in §§ 4.75 and 4.84, if the procedures set forth in the AES Trade Interface Requirements handbook are followed.

Revision of § 101.1

Section § 101.1 will be amended to define the term "business days" to mean the normal days of a work week: Monday through Friday, excluding national holidays as specified in § 101.6(a).

Revision of § 192.0

Section § 192.0 will be revised to account for the addition of a new Subpart B entitled "The Automated Export System (AES)."

Proposed § 192.11

Proposed § 192.11, entitled "Description of the AES", will describe, in general terms, the nature of the electronic filing system as an alternate method for exporters to comply with the export reporting requirements, and cross-reference proposed subpart E of the Census Regulations (15 CFR subpart E) as providing more fully for the AES.

Proposed § 192.12

Proposed § 192.12, entitled "Criteria for denial of applications requesting AES post-departure (Option 4) filing status; appeal procedures", will state the four (4) grounds on which Customs will base its denial of an applicant's request for this status, and provide the appeal process by which an applicant may challenge Customs decision. The four (4) grounds for rejection will be that the applicant:

(1) is not an exporter, as defined in the Census Regulations;

(2) has a history of non-compliance with export regulations. For example, the exporter has a history of late electronic submissions of commodity information or a record of non-submission of required export documentation;

(3) has been indicted, convicted or is currently under an investigation, wherein Customs has developed probable cause, for a felony involving any Customs law or any export law administered by another government agency; or

(4) has made or caused to be made in the "Letter of Intent" a false or misleading statement or omission with respect to any material fact.

Applicants denied Option 4 status by Customs will have the opportunity to appeal the decision by following the appeal procedure provided at proposed § 192.13(b). Applicants will be notified of the status of their appeal within thirty (30) calendar days of receipt by Customs, or, if a decision cannot be reached at that time, the applicant will be notified of an expected date for the final decision as soon as possible after the 30 calendar days. Applicants that are not approved by Customs may reapply after one year from the date of the final decision.

Proposed § 192.13

Proposed § 192.13, entitled "Revocation of AES participants' post-departure (Option 4) filing privileges; appeal procedures", will state the 4 grounds on which Customs may revoke a participant's Option 4 privileges, and provide the appeal process by which applicant's may challenge Customs decision. The 4 reasons for revocation will be that the filer:

(1) has made or caused to be made in the "Letter of Intent" a false or misleading statement or omission with respect to any material fact;

(2) is indicted, convicted or is currently under an investigation, wherein Customs has developed probable cause, for a felony involving any Customs law or any export law administered by another government agency;

(3) fails to substantially comply with export regulations. For example, the filer develops a history of late submissions of Option 4 commodity information or develops a history of non-compliance with other agencies' licensing regulations; or

(4) poses a significant threat to national security, such that his continued participation in Option 4 should be terminated.

Participants issued a revocation notice will have the opportunity to appeal the decision by contacting Customs at the address indicated within thirty (30) calendar days of receipt of notification. Applicants will be notified of the status of their appeal within thirty (30) calendar days of receipt by Customs, or if a decision cannot be reached at that time, the applicant will be notified of an expected date for the final decision as soon as possible after the 30 calendar days. Except as stated below, final revocation of Option 4 privileges will not take effect until all appeal procedures have been exhausted or until 30 calendar days after written notification of revocation, if no appeal is made. This will give the participant time to take corrective actions and include these actions as part of the appeal. However, Customs reserves the right to make the revocation effective immediately in cases of intentional violations of any Customs law on the part of the program participant or when required by national security. In such a case, the participant will be notified in writing and may appeal the decision, but will not be able to continue to file under Option 4 during the appeal process. The participants will be notified in writing of any revocation decision. Participants who have had their Option 4 privileges revoked, may still use the other two options for AES transmissions.

COMMENTS

Before adopting this proposal as a final rule, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4 of the Treasury Department Regulations (31 CFR 1.4), and § 103.11(b) of the Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9 a.m. and 4:30 p.m. at the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, the Ronald Reagan Building, 1300 Pennsylvania St., N.W., Suite 3000, Washington, D.C.

INAPPLICABILITY OF THE REGULATORY FLEXIBILITY ACT, AND EXECUTIVE ORDER 12866

Pursuant to provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.)*, it is certified that, if adopted, the proposed amendments will not have a significant economic impact on a substantial number of small entities, because booking information is already collected in the ordi-

nary course of business by sea carriers and the cost of transmitting the information electronically to Customs through AES, even if the carrier is not a certified AES participant, is not substantial. Accordingly, the proposed amendments are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604. Customs does request comments specifically concerning the economic impact of transmitting booking information on small carriers. This amendment does not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866.

PAPERWORK REDUCTION ACT

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget (OMB) for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507). Comments on the collection of information should be sent to the OMB, Attention: Desk Officer of the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, D.C. 20503. A copy should also be sent to Customs at the address set forth previously. Comments should be submitted within the time frame that comments are due regarding the substance of the proposal.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless the collection of information displays a valid control number.

The collection of information in these proposed regulations is at § 4.76, which provides for the transmission of booking information through the Sea Carrier's Module in the AES. Departure and manifest information is already approved under OMB control numbers: 1515–0062 for the General Declaration (Vessel Clearance) and 1515–0078 for the Cargo Declaration and the Cargo Declaration Outward with Commercial Forms. The paperwork burden for the application procedure for the Sea Carrier's Module is covered by the Census paperwork submission for proposed 15 CFR 30.60.

The booking information to be collected is necessary so that Customs can more effectively target high-risk shipments. The likely respondents are sea carriers that are required to submit outbound vessel manifest data.

The data which follows is presented in a range format. Depending on the size of the shipping company, the numbers reflecting the frequency of responses and the time associated with transmissions will vary:

Estimated total annual reporting and/or recordkeeping burden: 1,800–2,225 hours.

Estimated average annual burden per respondent/recordkeeper: 1–72 hours.

Estimated number of respondents and/or recordkeepers: 120–200.

Estimated annual frequency of responses: 6,500,000–8,000,000.

Comments are invited on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility;

(b) The accuracy of the agency's estimate of the burden of the collection of information;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or startup costs and costs of operations, maintenance, and purchase of services to provide information.

DRAFTING INFORMATION

The principal author of this document was Gregory R. Vilders, Attorney, Regulations Branch. However, personnel from other offices participated in its development.

LIST OF SUBJECTS

19 CFR Part 4

Cargo vessels, Common carriers, Customs duties and inspection, Declarations, Exports, Foreign commerce and trade statistics, Freight, Inspection, Maritime carriers, Merchandise, Reporting and recordkeeping requirements, Shipping, Vessels.

19 CFR Part 101

Customs duties and inspection, Customs ports of entry, Exports, Foreign trade statistics, Harbors, Imports, Organization and functions (Government agencies), Reporting and recordkeeping requirements, Shipments, Vessels.

19 CFR Part 192

Customs duties and inspection, Electronic filing, Export Control, Reporting and record keeping requirements, Vessels.

AMENDMENTS TO THE REGULATIONS

For the reasons stated above, it is proposed to amend parts 4, 101, and 192 of the Customs Regulations (19 CFR parts 4, 101, and 192), as set forth below:

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The general authority citation for part 4 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1431, 1433, 1434, 1624; 46 U.S.C.App. 3, 91.

* * * * * * *

2. A new § 4.76 is added to read as follows:

§ 4.76 Procedures and responsibilities of carriers filing outbound vessel manifest information via the AES.

(a) *The sea carrier's module.* The Sea Carrier's Module is a component of the Automated Export System (AES) *(see*, part 192, subpart B of this chapter) that allows for the filing of outbound vessel manifest information electronically *(see*, 15 CFR part 30). All sea carriers are eligible to apply for participation in the Sea Carrier's Module. Application and certification procedures for AES are found at 15 CFR 30.60. A sea carrier certified to use the module that adheres to the procedures set forth in this section and the Census Regulations (15 CFR part 30) concerning the electronic submission of an outbound vessel manifest information meets the outward cargo declaration filing requirements (CF 1302–A) of §§ 4.63 and 4.75 of this part, except as otherwise provided in §§ 4.75 and 4.84, and if procedures set forth in the AES Trade Interface Requirements handbook (see Customs internet web site (www.customs.ustreas.gov)) are followed.

(b) *Responsibilities.* Carriers and their agents are responsible for reporting accurate and timely information and for responding to all notifications concerning the status of their transmissions and the detention and release of freight in accordance with the procedures set forth in the AES Trade Interface Requirements handbook. Customs will send messages to participant carriers regarding the accuracy of their transmissions. AES participants are required to comply with the recordkeeping requirements contained at § 30.66 of the Census Regulations (15 CFR 30.66) and any other applicable recordkeeping requirements. Where paper SEDs have been submitted by exporters, participant carriers will be responsible for submitting those SEDs to Customs within four (4) business days after the departure of the vessel, unless a different time requirement is specified by §§ 4.75 or 4.84 of this part. Upon written agreement with participant sea carriers, Customs and Census can provide for an alternative to the location filing requirement for paper SEDs set forth in § 4.75(b) by which the participant carriers are otherwise bound.

(c) *Messages required to be filed within the sea carrier's module.* Participant carriers will be responsible for transmitting and responding to the following messages:

(1) *Booking.* Booking information identifies all the freight that is scheduled for export. Booking information will be transmitted to Customs via AES for each shipment as far in advance of departure as practical, but no later than seventy-two hours prior to departure for all information available at that time. Bookings received within seventy-two hours of departure will be transmitted to Customs via AES as received;

(2) *Receipt of booking.* When the carrier receives the cargo or portion of the cargo that was booked, the carrier will inform Customs so that Customs can determine if an examination of the cargo is necessary. Customs will notify the carrier of shipments designated for examination.

Customs will also notify the carrier when the shipment designated for inspection is released and may be loaded on the vessel;

(3) *Departure.* No later than the first business day following the actual departure of the vessel, the carrier will notify Customs of the date and time of departure; and

(4) *Manifest.* Within ten (10) business days after the departure of the vessel, the carrier will submit the manifest information to Customs via AES for each booking loaded on the departed vessel. However, if the destination of the vessel is a foreign port listed in § 4.75(c), the carrier must transmit complete manifest information before vessel departure. Time requirements for transmission of complete manifest information for carriers destined to Puerto Rico and U.S. possessions are the same as the requirement for the submission of the complete manifest as found in § 4.84.

(d) All penalties and liquidated damages that apply to the submission of paper manifests *(see*, applicable provisions in part 4 of this chapter) apply to the electronic submission of outbound vessel manifest information through the Sea Carrier's Module.

PART 101—GENERAL PROVISIONS

1. The general authority citation for part 101 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 2, 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1623, 1624, 1646a.

* * * * * * *

2. In § 101.1, add, in appropriate alphabetical order, the definition of "business day":

§ 101.1 Definitions.

* * * * * * *

Business day. A "business day" means a weekday (Monday through Friday), excluding national holidays as specified in § 101.6(a) of this part.

* * * * * * *

PART 192—EXPORT CONTROL

1. The authority citation for part 192 is revised to read as follows:

Authority: 19 U.S.C. 66, 1624, 1646c.

Subpart A also issued under 19 U.S.C. 1627a, 1646a;
Subpart B also issued under 13 U.S.C. 303; 46 U.S.C.App. 91.

2. In § 192.0, a third sentence is added to read as follows:

§ 192.0 Scope.

* * *. This part also makes provision for the Automated Export System (AES), implemented by the Census Regulations at Subpart E (15 CFR Subpart E), and provides the grounds under which Customs, as

one of the reviewing agencies of the government's export partnership, may deny an application for post-departure filing status or revoke a participant's privilege to use such filing option, and provides for the appeal procedures to challenge such action by Customs.

3. A new subpart B, consisting of §§ 192.11 through 192.13, is added to read as follows:

SUBPART B—FILING OF EXPORT INFORMATION THROUGH THE AUTOMATED EXPORT SYSTEM (AES)

Sec.

192.11 Description of the AES.
192.12 Criteria for denial of applications requesting AES post-departure (Option 4) filing status; appeal procedures.
192.13 Revocation of participant's AES post-departure (Option 4) filing privileges; appeal procedures.

SUBPART B—FILING OF EXPORT INFORMATION THROUGH THE AUTOMATED EXPORT SYSTEM (AES)

§ 192.11 Description of the AES.

AES is a voluntary program that allows all exporters required to report commodity export information *(see*, 15 CFR 30.16) to submit such information electronically, rather than on paper, and sea carriers to report required outbound vessel information electronically *(see*, §§ 4.63, 4.75, and 4.76 of this chapter). Eligibility and application procedures are found at subpart E of part 30 of the Census Regulations (15 CFR part 30, subpart E), denominated Electronic Filing Requirements—Exporters. These Census Regulations provide that exporters may choose to submit export information through AES by any one of three electronic filing options available. Only Option 4, the complete post-departure submission of export information, requires prior approval by participating agencies before it can be used by AES participants.

§ 192.12 Criteria for denial of applications requesting AES post-departure (Option 4) filing status; appeal procedure.

(a) *Approval Process*. Applications for the option of filing export commodity information electronically through AES after the vessel has departed (Option 4 filing status) must be unanimously approved by Customs, Census and other participating government agencies. Disapproval by one of the participating agencies will cause rejection of the application.

(b) *Grounds for Denial*. Customs may deny a participant's application for any of the following reasons:

(1) The applicant is not an exporter, as defined in the Census Regulations (15 CFR 30.7(d));

(2) The applicant has a history of non-compliance with export regulations *(e.g.*, exporter has a history of late electronic submission of commodity records or a record of non-submission of required export documentation);

(3) The applicant has been indicted, convicted, or is currently under an investigation, wherein Customs has developed probable cause, for a

felony involving any Customs law or any export law administered by another government agency; or

(4) The applicant has made or caused to be made in the "Letter of Intent," a false or misleading statement or omission with respect to any material fact.

(c) *Notice of denial; appeal procedures.* Applicants will be notified of approval or denial in writing by Census. (Applicants whose applications are denied by other agencies must contact those agencies for their specific appeal procedures.) Applicants whose applications are denied by Customs will be provided with the specific reason(s) for non-selection. Applicants may challenge Customs decision by following the appeal procedure provided at § 192.13(b) of this part.

§ 192.13 Revocation of participants' AES post-departure' (Option 4) filing privileges; appeal procedures.

(a) *Reasons for revocation.* Customs may revoke Option 4 privileges of participants for the following reasons:

(1) The exporter has made or caused to be made in the "Letter of Intent," a false or misleading statement or omission with respect to any material fact;

(2) The exporter submitting the "Letter of Intent" is indicted, convicted, or is currently under an investigation, wherein Customs has developed probable cause, for a felony involving any Customs law or any export law administered by another government agency;

(3) The exporter fails to substantially comply with export regulations; or

(4) Continued participation in AES as an Option 4 filer would pose a threat to national security, such that his continued participation in Option 4 should be terminated.

(b) *Notice of revocation; appeal procedures.* When Customs has decided to revoke a participant's Option 4 filing privileges, the participant will be notified in writing of the reason(s) for the decision. The participant may challenge Customs decision by filing an appeal within thirty (30) calendar days of receipt of the notice of decision. Except as stated below, the revocation shall become effective when the participant has either exhausted all appeal proceedings or thirty (30) calendar days after receipt of the notice of revocation if no appeal is filed. However, in cases of intentional violations of any Customs law on the part of the program participant or when required by the national security, revocations will become effective immediately upon notification. Appeals should be addressed to the National Outbound Process Owner, U.S. Customs, Ronald Reagan Building, 1300 Pennsylvania Ave, NW Room 5.4c, Washington D.C. 20229. Customs will issue a written decision or notice of extension to the participant within thirty (30) calendar days of receipt of the appeal. If a notice of extension is forwarded, the applicant will be provided with the reason(s) for extension of this time period and an expected date of decision. Participants who have had their Option 4 filing privileges revoked and applicants not selected to participate in

AES, may not reapply for this filing status for one year following written notification of rejection or revocation.

RAYMOND W. KELLY,
Commissioner of Customs

Approved: December 9, 1998.

JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, February 12, 1999 (64 FR 7422)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa Anne Ridgway

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Dominick L. DiCarlo

Nicholas Tsoucalas

R. Kenton Musgrave

Clerk

Raymond F. Burghardt

(Slip Op. 99–6)

KAJARIA IRON CASTINGS PVT. LTD., CALCUTTA FERROUS LTD., CRESCENT FOUNDRY CO. PVT. LTD., COMMEX CORP., DINESH BROTHERS, NANDIKESHWARI PVT. LTD., CARNATION ENTERPRISES PVT. LTD., KEJRIWAL IRON & STEEL WORKS, R.B. AGARWALLA & CO., RSI LTD., SERAMPORE INDUSTRIES PVT. LTD., TIRUPATI INTERNATIONAL (P) LTD., AND UMA IRON & STEEL CO., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND ALHAMBRA FOUNDRY, INC., ALLEGHENY FOUNDRY CO., DEETER FOUNDRY, INC., EAST JORDAN IRON WORKS, INC., LEBARON FOUNDRY INC., MUNICIPAL CASTINGS, INC., NEENAH FOUNDRY CO., U.S. FOUNDRY & MANUFACTURING CO., AND VULCAN FOUNDRY, INC., DEFENDANT-INTERVENORS

Court No. 95–09–01240

(Dated January 14, 1999)

ORDER

DICARLO, *Senior Judge:* In conformity with the order and opinion of the United States Court of Appeals for the Federal Circuit, it is hereby

ORDERED that this action is remanded to the United States Department of Commerce, International Trade Administration for further proceedings in conformity with the order and opinion of the United States Court of Appeals for the Federal Circuit; and it is further

ORDERED that Commerce shall file its remand results with the court within 45 days of the date of this order; and it is further

ORDERED that any party contesting the remand results shall file comments with the court within 30 days of the remand results.

(Slip Op. 99–7)

JACK A. ERDLE, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 97–09–01514

Plaintiff moves for summary judgment pursuant to U.S. CIT R. 56(a), contending he is entitled to judgment as a matter of law because the United States Customs Service (Customs) improperly classified the merchandise at issue under subheading 7116.10.10 of the Harmonized Tariff Schedule of the United States (HTSUS) and instead should have classified it under subheading 7101.10.30, HTSUS. Plaintiff seeks attorney's fees and costs and if summary judgment is denied demands a jury trial. Defendant cross-moves for summary judgment pursuant to U.S. CIT R. 56, contending that it is entitled to judgment as a matter of law because Customs properly classified the merchandise at issue under subheading 7116.10.10, HTSUS.

Held: The Court finds there are genuine issues of material fact requiring trial. Plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment are denied. Plaintiff's motion for attorney's fees and costs is denied. Plaintiff's alternative demand for a jury trial is vacated.

(Dated January 15, 1999)

Office of Stephen D. Rogoff (Stephen D. Rogoff, Leonard A. Rosner), Rochester, NY, for plaintiff.

Frank W. Hunger, Assistant Attorney General of the United States; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Aimee Lee); Sheryl A. French,* Office of the Assistant Chief Counsel for International Trade Litigation, United States Customs Service, of Counsel, for defendant.

OPINION

CARMAN, *Chief Judge:* Plaintiff moves for summary judgment pursuant to U.S. CIT R. 56(a), contending he is entitled to judgment as a matter of law because the United States Customs Service (Customs) improperly classified the merchandise at issue under subheading 7116.10.10 of the Harmonized Tariff Schedule of the United States (HTSUS) and that Customs should have classified it under subheading 7101.10.30, HTSUS. Plaintiff also moves for attorney's fees and costs. If summary judgment is denied plaintiff demands a jury trial. Defendant cross-moves for summary judgment pursuant to U.S. CIT R. 56(b), contending that it is entitled to judgment as a matter of law because Customs properly classified the merchandise at issue under subheading 7116.10.10, HTSUS, and that plaintiff's proposed classification is erroneous as a matter of law. The Court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (1994).

BACKGROUND

Plaintiff, Jack A. Erdle imported the merchandise at issue, as well as other items that were purchased while on vacation with his wife in East Asia, into the United States through San Francisco International Airport in a single importation on October 31, 1996. The merchandise at issue consisted of south sea natural pearls on a string and a gold clasp. The clasp was unattached to the string or the pearls. On purchase in-

voice number 14188, the merchandise at issue was described as "One St South Sea Pearl Necklace" and "One pl gold clasp" and the two items were valued together at $22,800. (Plaintiff's Motion for Summary Judgment (PMSJ), Exhibit A–1.) The other items imported by plaintiff included two "pc" of "loose south sea pearls," invoice number 36484, and three "str. of cultured pearls," invoice number 2097, and were valued at $1767 and $3100 respectively. (PMSJ, Exhibit A–2, Exhibit A–3.) Customs classified all three sets of pearls and the clasp under subheading 7116.10.25 (articles of cultured pearls), HTSUS, at 8.8% *ad valorem*, and imposed a duty of U.S. $2,627 for all declared items. No separate duty was imposed for the clasp.

Plaintiff paid the sum demanded but protested the duty imposed on the two "pc" of "loose south sea pearls" as well as the duty imposed on the merchandise at issue. In a letter to Customs dated November 19, 1996, plaintiff argued the pearls should be classified under subheading 7101.10.30 (natural pearls graded and temporarily strung for convenience of transport), HTSUS, duty free. By letter dated February 19, 1997, Customs reassessed the duties for the two "pc" of "loose south sea pearls" at a free rate of duty under subheading, 7101.10.30, and reassessed the merchandise at issue at $1,185.60, classifying it under subheading 7116.10.10 (articles of natural pearls), HTSUS, at 5.2% *ad valorem*. Customs refunded duties to plaintiff in the amount of $1,085. Plaintiff still contends that the merchandise at issue should have been classified under 7101.10.30, HTSUS, and initiated this suit to recover the $1,185.60 in duties paid. Additionally, plaintiff requests attorney's fees and costs, and if summary judgment is denied, demands a jury trial.

CONTENTIONS OF THE PARTIES

A. *Plaintiff*

Plaintiff contends no genuine issues of material fact exist, and he is entitled to judgment as a matter of law. Plaintiff argues Customs improperly classified the merchandise under 7116.10.10, HTSUS, the heading for "articles of natural pearls." Customs made this incorrect classification, according to plaintiff, because it erroneously viewed the merchandise as an unassembled pearl necklace having the "essential character" of an assembled pearl necklace and thus properly classifiable under the heading "articles of natural pearls." Rather, plaintiff argues, "there should be no duty imposed upon the 'South Sea Natural' pearls as same was not an unassembled complete article, nor did it possess the essential characteristics of a complete article." (Plaintiff's Reply Affirmation in Opposition to Defendant's Cross-Motion for Summary Judgment (PRA) at ¶17.) Plaintiff alleges that the merchandise as imported could not have been "worn in public" (PRA at ¶14) and that sufficient components and processes necessary to transform the merchandise into a necklace were missing so that the "items imported by the Plaintiff, did not possess the essential characteristics of the completed necklace." (PRA at ¶15.) Furthermore, plaintiff alleges that the gold clasp was transported in the breast pocket of plaintiff's jacket, sepa-

rate from the merchandise at issue which was in a bag. (Attorney Affirmation, PMSJ at 4.) Plaintiff further argues that defendant has not established why the gold clasp was considered in conjunction with the pearls of invoice number 14188 and not with the pearls of invoice numbers 36484 or 2097, or for that matter as a souvenir with an entirely different purpose. (Attorney Affirmation, PMSJ at 4–5.) Finally, plaintiff argues the merchandise should have been classified under subheading 7101.10.30, HTSUS, because the merchandise at issue was pearls "temporarily strung for the convenience of transport." (PRA at ¶3.)

B. *Defendant*

Defendant, contending there are no genuine issues of material fact, argues it is entitled to judgment as a matter of law because Customs properly classified the merchandise at issue. Defendant contends the "imported strung south sea pearls and clasp cannot fall within subheading, 7101.10.30, HTSUS, as temporarily strung natural pearls," (Defendant's Reply Memorandum to Plaintiff's Reply Affirmation in Opposition to Defendant's Cross-motion for Summary Judgment (DRM) at 8) but must instead be classified as an incomplete or unfinished pearl necklace. Defendant notes that under the General Rule of Interpretation of the HTSUS (GRI), 2(a), "incomplete or unfinished" articles that have the "essential character of the complete or finished article" are included under the heading for the complete or finished article. According to defendant, pearl necklaces are properly classified under 7116.10.10, HTSUS, based on the Explanatory Notes to Section XIV 71.16 ("pearl necklace with a gold fastener" is to be included under heading 7116). Defendant further argues that despite the lack of components and processes alleged by the plaintiff, the merchandise as imported had the "essential character" of a pearl necklace and was therefore classifiable under 7116.10.10, HTSUS, as an unfinished article of pearls. In the alternative, defendant asserts that the additional components and processes alleged to be lacking by the plaintiff were "nominal." Furthermore, defendant notes that plaintiff acknowledges that the merchandise at issue, i.e., the clasp and the pearls of invoice number 14188, were acquired together, and that invoice 14188 describes the pearls as a "south sea pearl necklace" (DRM at 5). Finally, defendant contends that plaintiff withdrew the argument that the clasp might have been intended for use with the other sets of pearls.[1] In sum, defendant claims that the merchandise "is appropriately classified under subheading 7116.10.10, HTSUS, as an article of natural pearls, incomplete or unfinished, pursuant to GRI 2(a), [and] the Government's [cross] motion for [summary] judgment should be granted." (DRM at 8.)

[1] It would appear defendant is mistaken. It would seem plaintiff did not withdraw the argument that the clasp might have been intended for use with the other pearls as a "pearl necklace," rather plaintiff merely withdrew the assertion that each of the three times he purchased pearls the seller gave plaintiff a free gold clasp. (Stipulated Facts at ¶10; Attorney Affirmation, PMSJ 2, 4–5.)

STANDARD OF REVIEW

This case is before the Court on plaintiff's motion and defendant's cross-motion for summary judgment. Summary judgment is appropriate if, based on the papers before the Court, "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." U.S. CIT R. 56(d). When there is a factual dispute, however, and "a reasonable trier of fact" could return a verdict for the non-movant, summary judgment will be denied. *Ugg Int'l, Inc. v. United States*, 17 CIT 79, 83, 813 F. Supp. 848, 852 (1993). When appropriate, summary judgment is a favored procedural device to "secure the just, speedy and inexpensive determination" of an action. *Sweats Fashions, Inc. v. Pannill Knitting Co., Inc.*, 833 F.2d 1560, 1562 (Fed. Cir. 1987) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S. Ct. 2548, 2555, 91 L. Ed. 2d 265 (1986)) (internal quotations omitted).

DISCUSSION

The rules of this Court provide that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any" shall be examined by the Court in determining whether a genuine issue of material fact exists which precludes summary judgment. U.S. CIT R. 56(d). In evaluating the papers before it, the Court finds genuine issues of material fact requiring trial exist in this matter, and accordingly the Court denies plaintiff's motion and defendant's cross-motion for summary judgment.

Genuine issues of material fact exist in this case. The parties dispute the very nature and character of the merchandise. Plaintiff describes the merchandise at issue as natural pearls, graded and loosely strung on a single string for the convenience of transport. Defendant characterizes the merchandise as an unassembled or unfinished necklace made from natural pearls. While the parties stipulate that the merchandise consists of natural pearls on a single string together with an unattached gold clasp, the record is unclear how the pearls were strung; how the string was knotted; how the pearls were kept on the string; and the type and nature of the string. It is not clear if the clasp is designed for a pearl necklace or some other purpose. The record does not disclose the value or size of the clasp. Therefore, based on the record the Court is unable to determine whether the merchandise is a complete or finished article, or an incomplete and unfinished article having the essential character of a pearl necklace. As the nature and character of the merchandise affects whether it should be classified as an incomplete or unfinished pearl necklace under the subheading for articles of natural pearls, 7116.10.10, HTSUS, at 5.2% *ad valorum*, or whether it is simply an assemblage of pearls loosely strung for the convenience of transport, and classified under the subheading for natural pearls, graded and temporarily strung for convenience of transport, 7110.10.30, HTSUS, duty free, this Court must deny both motions for summary judgment.

Where there are material facts at issue on a motion for summary judgment, the Court cannot examine the evidence and make findings of fact.

See Bausch & Lomb, Inc. v. United States, 148 F. 3d 1363, 1365 (Fed. Cir. 1998). Because the Court finds there are material facts at issue, plaintiff's motion and defendant's cross-motion for summary judgment are denied.

Plaintiff has not demonstrated grounds upon which its application for attorney's fees and costs should be granted. Plaintiff's application for attorney's fees and costs therefore is also denied. Additionally, plaintiff's demand for a jury trial in this matter is vacated. *See Washington Int'l Ins. Co. v. United States*, 863 F.2d 877, 879 (Fed. Cir. 1988); *Halperin Shipping Co., Inc. v. United States*, 725 F. Supp. 1259, 1263 (CIT 1989).

CONCLUSION

Plaintiff's motion and defendant's cross-motion for summary judgment are denied. Plaintiff's motion for attorney's fees and expenses is denied. Plaintiff's alternative demand for a jury trial is vacated. Parties are directed to file a joint proposed Pretrial Order within 30 days from the date herein.

(Slip Op. 99–8)

AMERICAN BAYRIDGE CORP., PLAINTIFF *v.*
UNITED STATES OF AMERICA, DEFENDANT

Court No. 98–08–02682

(Dated January 21, 1999)

JUDGMENT

BARZILAY, *Judge:* This case contesting the decision of the United States Customs Service, in HQ962042, denying protest number 3401–98–100012 as to the classification of imported merchandise ("predrilled studs") and the effective date of an interpretive ruling issued pursuant to 19 U.S.C. § 1625(c) having been submitted for decision; and the Court, after due deliberation, having rendered a decision in Slip Opinion No. 98–166; and

Whereas the United States Customs Service has made available to the Court port instructions which it intends to issue in light of said Slip Opinion, a copy of which will be filed with the Court upon entry of final judgment by the Court in this case, declaring its intention to post Bulletin notices of liquidation or reliquidation, as appropriate, within 30 days of its receipt of Supplemental Information Letters or timely protests from affected importers;

Now therefore, in conformity with said decision it is

ORDERED that Plaintiff's motion for summary judgment as to the classification of predrilled studs under heading 4418, HTSUS, be and hereby is, denied; and it is further

ORDERED that Defendant's cross-motion for summary judgment, as to the classification of predrilled studs, be and hereby is, granted, upholding classification under subheading 4407.10.00, HTSUS; and it is further

ORDERED that Plaintiff's motion for summary judgment as to the effective date of an interpretive ruling issued pursuant to 19 U.S.C. § 1625(c) with respect to the rights of all importers, be and hereby is, granted; and it is further

ORDERED that Defendant's cross-motion for summary judgment as to the effective date of an interpretive ruling issued pursuant to 19 U.S.C. § 1625(c), be and hereby is, denied.

(Slip Op. 99–9)

TIMKEN CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND KOYO SEIKO CO., LTD. AND KOYO CORP. OF U.S.A., DEFENDANT-INTERVENORS

Court No. 97–04–00562

(Dated January 22, 1999)

JUDGMENT

TSOUCALAS, *Senior Judge:* This Court, having received and reviewed the United States Department of Commerce, International Trade Administration's (Commerce) *Final Results of Redetermination Pursuant to Court Remand, The Timken Company v. United States, Slip Op. 98–92, July 2, 1998, Court No. 97–04–00562* ("Remand Results") filed September 29, 1998, and upon finding that Commerce complied with the Court's remand order, and no comments to the Remand Results having been received, hereby

ORDERS that the Remand Results are affirmed in their entirety; and further

ORDERS that, all other issues having been decided, this case is dismissed.

(Slip Op. 99–10)

FLORAL TRADE COUNCIL, PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND ASOCIACION COLOMBIANA DE EXPORTADORES DE FLORES, ET AL., DEFENDANT-INTERVENORS

Consolidated Court No. 97–11–01988

[Sustained in part; remanded in part.]

(Decided January 27, 1999)

Stewart and Stewart, (Terence P. Stewart, James R. Cannon, Jr., Amy S. Dwyer, William A. Fennell, and *Mara M. Burr)* for Plaintiff.

Frank W. Hunger, Assistant Attorney General of the United States; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Lucius B. Lau,* Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice; Of Counsel, *Mildred E. Steward,* Office of the Chief Counsel for Import Administration, United States Department of Commerce, for Defendant.

Arnold & Porter, (Michael T. Shor and *Kevin T. Traskos)* for Defendant-Intervenors.

OPINION

POGUE, *Judge:* This matter is before the Court on the separate motions of Plaintiff, Floral Trade Council ("FTC"), and Defendant-Intervenors, Asociacion Colombiana de Exportadores de Flores, et al. ("Asocoflores"), for judgment on the agency record pursuant to U.S. CIT Rule 56.2. The parties filed separate actions challenging various aspects of the Department of Commerce's ("Commerce") final results of the ninth administrative review[1] of the antidumping duty order on certain fresh cut flowers from Colombia. See *Certain Fresh Cut Flowers From Colombia*, 62 Fed. Reg. 53,287 (Dep't Commerce, Oct. 14, 1997)(final determination)("Final Results"). The actions were consolidated.

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(c)(1994) and 19 U.S.C. § 1516a(a)(2)(B)(iii)(1994).

The ninth administrative review covers a total of 351 Colombian producers and/or exporters of standard carnations, miniature (spray) carnations, standard chrysanthemums, and pompon chrysanthemums during the period March 1, 1995 through February 29, 1996 ("the period of review"). *See* Final Results at 53,288. Given the large number of producers and/or exporters, Commerce narrowed its examination to the thirteen respondents accounting for the largest volume of subject flowers in accordance with § 777A(c)(2)(B) of the Tariff Act of 1930, *as amended*, 19 U.S.C. § 1677f–1(c)(2)(B)(1994).[2] *See Certain Fresh Cut Flowers From Colombia*, 62 Fed. Reg. 16,772 (Dep't Commerce, Apr. 8, 1997)(preliminary results).

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[1] The antidumping statute provides for Commerce to conduct an administrative review of an antidumping duty order upon the request of an interested party. *See* 19 U.S.C. § 1675. As a result of the administrative proceeding, Commerce determines the actual antidumping duty rate for the entries covered by that period of review and establishes the duty deposit rate for future entries. *See id.*

[2] Unless otherwise indicated, all citations to the antidumping statute are references to the provisions effective January 1, 1995, the effective date of the amendments to the statute by the Uruguay Round Agreements Act ("URAA"). In addition, unless otherwise indicated, all citations to Commerce's regulations are to those codified at 19 C.F.R. § 353 (April 1997).

FTC challenges: (1) Commerce's decision not to deduct commissions paid to affiliated consignment agents from constructed export price and (2) Commerce's decision not to collect third-country sales prices from the respondents in the review ("respondents") to determine whether third-country prices could be used as a basis for normal value.[3] *See* Pl.'s Mot. for J. on the Agency R. at 2.

Asocolfores challenges: (1) Commerce's rejection of the constructed value "profit cap" in calculating constructed value, *see* Initial Br. of Def.-Intervenors in Supp. of Rule 56.2 Mot. for J. on the Agency R. ("Asocolfores Br.") at 2; (2) Commerce's determination to deduct credit expenses from U.S. price but not from constructed value, *see id.* at 3; (3) Commerce's determination to exclude antidumping surcharges from constructed export price, *see id.* at 4; (4) Commerce's decision not to include the net monetary correction in calculating constructed value, *see id.* at 5; (5) Commerce's issuance of erroneous questionnaire instructions and subsequent penalization of respondents for complying with such instructions,[4] *see id.* at 6; (6) Commerce's calculation and application of the constructed export price profit ratio, *see id.* at 7; (7) Commerce's decision to impute a consolidated general and administrative expense rate for all farms of the HOSA Group in calculating the cost of production, *see id.* at 8; and (8) Commerce's determination not to allocate any production costs to second quality subject flowers.[5] *See id.*

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[3] This Court sustained Commerce's decision to resort to constructive value rather than use third-country prices in the appeal of the final results for the consolidated fifth, sixth, and seventh administrative reviews. *See Asociacion Colombiana de Exportadores de Flores, et al. v. United States*, 22 CIT ___, ___, 6 F. Supp.2d 865, 901–03 (1998). In its brief, FTC offers no legal or factual arguments to advance its position that Commerce should have used third-country sales prices as the basis for normal value. *See* Pl.'s Mem. of P. & A. in Supp. of Rule 56.2 Mot. for J. on the Agency R. at 10. Instead, FTC merely states that it raises the issue again in the present action to preserve it pending the appeal of this Court's decision in *Asociacion*. *See id.*

Although this Court's decision in *Asociacion* applied the pre-URAA version of the antidumping statute, the current law codifies Commerce's prior practice. *See* 19 U.S.C. § 1677b(a)(1)(B)(ii)(III)(1994)(requiring Commerce to reject third-country prices as a basis for normal value when "the particular market situation in such other country prevents a proper comparison with the export price or constructed export price."). Moreover, the factual basis supporting Commerce's decision to reject third-country sales has not changed since the prior reviews. *See* Recommendation Memorandum Regarding Calculation of Normal Value (Pub. Doc. 309)(Nov. 21, 1996) at 7–8. Therefore, the Court sustains Commerce's decision to reject third-country sales as the basis for normal value.

[4] For purposes of the ninth administrative review, Commerce's questionnaire instructed respondents not to offset expenses with interest income or other revenue in calculating indirect selling expenses (a component of the constructed export price). Because, as Asocolfores correctly notes, the antidumping statute and regulations require compliance with Commerce's instructions, the respondents accordingly did not offset indirect selling expenses with interest income in completing the questionnaire. *See* Asocolflores Br. at 41–42 (citing 19 C.F.R. § 353.37 and 19 U.S.C. § 1677e).

One respondent, however, Queen's Flowers Group, noted in its response that it believed Commerce's instruction to treat interest expenses as indirect selling expenses while ignoring interest income was unfair. *See id.* at 41 (citing Queen's July 19, 1996 Submission (Pub. Doc. 240) at 56–57). In its final determination, Commerce "acknowledge[d] that the questionnaire did not clearly reflect the Department's practice of allowing interest income offsets in limited circumstances[,]" but only allowed Queen's Flowers Group to make the adjustment, since Queen's raised the issue in a "timely manner[.]" Final Results at 53,294.

Asocolflores argues that Commerce's determination is inconsistent with the procedural regulations and deprives respondents of procedural due process by penalizing them for complying with Commerce's own express instructions. *See* Asocolflores Br. at 42.

Commerce concedes that this issue should be remanded. *See* Def.'s Mem. in Partial Opp'n to Def.-Intervenors' Mot. for J. on the Agency R. at 47. Because the antidumping statute and regulations require compliance with Commerce's instructions, and because the instructions issued in this review were inconsistent with Commerce's practice, the Court remands the issue directing Commerce to: (1) reconsider this issue; (2) allow respondents to submit information concerning the interest income offset to indirect selling expenses in calculating constructed export price; and (3) make adjustments, as appropriate, based upon this information.

[5] This Court sustained Commerce's decision not to allocate any costs of production to "national quality" flowers sold in the home market for the fifth, sixth, and seventh administrative reviews. *See Asociacion*, 22 CIT at , 6 F. Supp.2d at 880–83. In its brief, Asocolflores states, "[s]ince we are not making any new arguments or presenting any new factual evidence to the Court, we simply identify the issue here to preserve it for any future appeal." Asocolflores Br. at 54. The Court sustains Commerce's treatment of national quality flowers in the ninth review.

STANDARD OF REVIEW

The Court will uphold a Commerce determination in an administrative review unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(b)(1)(B)(i)(1994).

The issues presented here primarily require the Court to determine whether Commerce's interpretations of the antidumping statute are permissible. In determining whether Commerce's interpretation and application of the antidumping statute is in accordance with law, the Court applies the two-step analysis articulated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984), as applied and refined by the Court of Appeals for the Federal Circuit ("Federal Circuit").

The first step is to investigate a matter of law—"whether Congress's purpose and intent on the question at issue is judicially ascertainable." *Timex V.I., Inc. v. United States*, 157 F.3d 879, 881 (Fed. Cir. 1998)(citing *Chevron*, 467 U.S. at 842–43 & n.9). "To ascertain whether Congress had an intention on the precise question at issue, [the Court] employ[s] the 'traditional tools of statutory construction.'" *Id.* at 882 (citing *Chevron*, 467 U.S. at 843 n.9). If the statute's plain language answers the question, "that is the end of the matter." *Id.* (citing *Muwwakkil v. Office of Personnel Management*, 18 F.3d 921, 924 (Fed. Cir. 1994)). Beyond the statute's text, the tools of statutory construction include the statute's legislative history, the statute's structure, and the canons of statutory construction.[6] *See id.*

If, after employing the first prong of *Chevron*, the Court determines that the statute is silent or ambiguous with respect to the specific issue, the Court proceeds to the second step. *See Chevron*, 467 U.S. at 843. The second step concerns an issue of policy. Because Congress intended to delegate policymaking to Commerce, the Court must defer to Commerce's reasonable interpretation. *See Koyo Seiko Co., Ltd. v. United States*, 36 F.3d 1565, 1573 (Fed. Cir. 1994). "In determining whether Commerce's interpretation is reasonable, the Court considers, among other factors, the express terms of the provisions at issue, the objectives of those provisions[,] and the objectives of the antidumping scheme as a whole." *Mitsubishi Heavy Industries, Ltd. v. United States*, 22 CIT ____, ____, 15 F. Supp.2d 807, 813 (1998).

DISCUSSION

Commerce calculates an antidumping duty by comparing an imported product's price in the United States to its normal value ("NV")(i.e., the price of comparable merchandise in the exporting country). The dumping margin is the amount by which the normal value exceeds the United States price. *See* 19 U.S.C. § 1673 (1994).

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[6] Not all rules of statutory construction rise to the level of a canon, however. *See U.S. Steel Group v. United States*, 22 CIT ____, ____, 998 F. Supp. 1151, 1157–58 (1998)(rejecting the use of the maxim *expressio unius est exclusio alterius* to discern Congress's intent under *Chevron* step one).

The United States price is calculated as either the "export price" ("EP") or the "constructed export price" ("CEP"). *See* 19 U.S.C. § 1677a. Typically, Commerce uses EP when the foreign exporter sells directly to an unrelated U.S. purchaser. *See* 19 U.S.C. § 1677a(a). Commerce uses CEP when the foreign exporter sells through a related party in the United States. *See* 19 U.S.C. § 1677a(b).

NV is the price of the merchandise in the producer's home market or its export price to countries other than the United States. *See* 19 U.S.C. § 1677b(a)(1). Where Commerce cannot compute the home market price, Commerce may base NV on a constructed value ("CV"), *see* 19 U.S.C. § 1677b(a)(4), which is calculated pursuant to § 1677b(e).

I. Commerce's Decision Not to Deduct Commissions Paid to Affiliated Consignment Agents from CEP[7]

In a consignment arrangement, the exporter (the consignor) delivers merchandise to an agent in the United States (the consignee) under agreement that the agent will sell the merchandise for the account of the exporter. *See* EDWARD G. HINKELMAN, DICTIONARY OF INTERNATIONAL TRADE 44 (1994). The consignor retains title to the goods sold, and the consignee sells the goods for commission, remitting the net proceeds to the consignor. *See id.*; *see also* BLACK'S LAW DICTIONARY 307 (6th ed.). Here, certain Colombian exporters were engaged in consignment arrangements during the period of review, paying commissions to both affiliated and unaffiliated consignees. *See* Def.'s Mem. in Opp'n to Pl.'s Mot. for J. on the Agency R. ("Def.'s Mem. in Opp'n to Pl.") at 11.

The statute provides for the deduction of certain expenses from CEP, including commissions:

> [T]he price used to establish constructed export price shall also be reduced by—
>
> (1) the amount of any of the following expenses generally incurred by or for the account of the producer or exporter, or the affiliated seller in the United States, in selling the subject merchandise (or subject merchandise to which value has been added)—
>
> (A) commissions for selling the subject merchandise in the United States;
>
> (B) expenses that result from, and bear a direct relationship to, the sale, such as credit expenses, guarantees and warranties;
>
> (C) any selling expenses that the seller pays on behalf of the purchaser; and
>
> (D) any selling expenses not deducted under subparagraph (A), (B), or (C)[.]

19 U.S.C. § 1677a(d)(1)(1994).

For the unaffiliated consignees, Commerce deducted the commissions paid by the exporters from the CEP. *See* Def.'s Mem. in Opp'n to Pl. at 11. For the affiliated consignees, however, Commerce explained that it did

[7] This Court previously sustained Commerce's decision not to deduct commissions paid to related consignees in the fifth, sixth, and seventh administrative reviews of Certain Fresh Cut Flowers from Colombia. *See Asociacion*, 22 CIT at ____, 6 F. Supp.2d at 898–901. Because the wording of the applicable statutory provision has since been amended by the URAA, and the parties make different arguments, the Court revisits the issue here.

not deduct commissions paid by exporters from the CEP because to do so would have led to "double-counting." *See* Final Results at 53,294. Commerce argues that the commissions paid to affiliated consignees reimburse them for expenses that Commerce already deducts as indirect selling expenses under § 1677a(d)(1)(D). *See* Def.'s Mem. in Opp'n to Pl. at 14. Therefore, deducting both the commissions paid to affiliated consignees and indirect selling expenses would double-count the expenses. *See id.* In contrast, double-counting does not arise from the deduction of commissions for the unaffiliated consignees because the statute does not require the deduction of the unaffiliated consignees' U.S. selling expenses from CEP. *See* 19 U.S.C. § 1677a(d)(1).

FTC points out that the plain language of the amended provision does not distinguish between commissions paid to affiliated and unaffiliated parties. *See* Pl.'s Mem. of P. & A. in Supp. of Rule 56.2 Mot. for J. on the Agency R. ("FTC Br.") at 8. Although the statute does appear to require the expense represented by commissions to be deducted from CEP whether or not the producer/exporter and U.S. consignee are related, the statute does not define "commission." Where, as here, Congress's intended definition of "commission" is not ascertainable through the traditional tools of statutory construction, the Court will defer to Commerce's reasonable interpretation. *See Koyo Seiko*, 36 F.3d at 1573.

This Court has sustained Commerce's practice of treating commissions paid by the producer/exporter to a related consignee as an intra-company transfer, rather than as a true commission because they merely serve as reimbursements to related parties. *See Asociacion*, 22 CIT at ___, 6 F. Supp.2d at 900.[8] Commerce's decision not to deduct commissions paid to affiliated consignees is therefore reasonable to the extent that it fulfills the statutory objective of preventing double-counting. *See U.S. Steel Group v. United States*, 22 CIT ___, ___, 15 F. Supp.2d 892, 905 (1998)(holding that, "if because of the relatedness of the producer and U.S. selling agent expenses represented by the commissions are already accounted for by means of a deduction for selling expenses nominally made under another provision of 19 U.S.C.A. § 1677a(d) * * *, no additional commission deduction need be made.").

FTC, however, does not dispute that the prevention of double-counting is a reasonable application of the statute. *See* Pl.'s Reply to Def.-Intervenors' Rebuttal Br. at 1–2. FTC explains that double-counting of the deduction will not occur because the statute "instructs [Commerce] to calculate constructed export price first by deducting commissions and direct selling expenses and then [by] any selling expenses *not already deducted*." FTC Br. at 8 (citing 19 U.S.C. § 1677a(d))(emphasis provided). "To the extent that the record demonstrates that the commissions include reimbursement for expenses incurred by the consignee, such expenses, already adjusted for under subparagraph A, would not be

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[8] Although the Court's decision in *Asociacion* involved pre-URAA law, the amended statute continues not to define "commission." Therefore, the Court's analysis in that decision is still applicable here.

adjusted for under subparagraph D." Pl.'s Reply to Def.-Intervenors' Rebuttal at 2.

Instead, FTC argues that Commerce's application of the statute violates its plain language because Commerce did not apply the deductions of 19 U.S.C. § 1677a(d)(1) in proper sequence. *See id.* at 2. FTC contends that the statute sets up a hierarchy of deductions to be followed sequentially. *See* FTC Br. at 8. According to FTC, "[Commerce] cannot properly implement the statutory language unless it performs its adjustments in sequence." Pl.'s Reply to Def.-Intervenors' Rebuttal Br. at 2.

Neither the statute nor its legislative history, however, explicitly requires that the deductions should be made in literal sequence. Subparagraph (D) requires Commerce to reduce CEP by "any selling expenses not deducted under subparagraph (A), (B), or (C)[.]" 19 U.S.C. § 1677a(d)(1)(D). So long as expenses are not double-counted under subparagraph (D), Commerce may apply the deductions in any order reasonable under the circumstances. Here, Commerce's application of the statute would seemingly result in the exact same calculation for total adjustments to CEP advocated by FTC. Because Commerce's application of the statute neither violates Congress's express intent nor is unreasonable, it is in accordance with law.

Nevertheless, Commerce's determination must also be supported by substantial evidence. FTC argues that the record does not demonstrate that commissions paid to affiliated consignees were reimbursements (i.e., intracompany transfers) for their U.S. selling expenses, and therefore, "[Commerce's] failure to deduct such commissions is unsupported by substantial evidence[.]" Pl.'s Reply to Def.-Intervenors' Rebuttal Br. at 2–3. The record, however, indicates that commissions paid to related consignees were intracompany transfers by definition, since Commerce's questionnaire instructs that "commissions paid to affiliates need not be reported." *See* Dep't of Commerce Questionnaire (Public Doc. 42)(May 16, 1996) at C–16.

FTC further appears to be concerned that, to the extent that commissions paid to affiliated consignees exceed the consignees' indirect selling expenses, Commerce fails to deduct the difference as a commission expense to producers/exporters. FTC's concern is resolved, however, by § 1677a(d)(3), a new provision under the URAA that requires CEP to also be reduced by "the profit allocated to the expenses described in paragraphs (1) and (2),"[9] which include indirect selling expenses. 19 U.S.C. § 1677a(d)(3). While commissions represent expenses to the paying producers, the amount by which the commissions exceed the selling expenses incurred by consignees constitute profit for these consignees. By reducing CEP by the profit allocated to the indirect selling expenses incurred by affiliated consignees, the provision assures that CEP will not be inflated to the extent that the commissions paid to affiliated con-

[9] The expenses in paragraph (1) refer to commissions, direct selling expenses, selling expenses paid by the seller on behalf of the purchaser, and indirect selling expenses. *See* 19 U.S.C. § 1677a(d)(1). Paragraph (2) refers to "the cost of any further manufacture or assembly" in the United States. 19 U.S.C. § 1677a(d)(2).

signees exceed their expenses. In this regard, Congress instructed Commerce to calculate a "statutory profit" as opposed to an "accounting profit." At oral argument on January 12, 1999, Commerce demonstrated that this adjustment was made for commissions paid to related consignees that exceeded the consignees' actual expenses. *See* Commerce Calculation Printout (Prop. Doc. 285)(Oct. 6, 1997) at line 661.

Therefore, the Court sustains Commerce's decision not to deduct commissions paid to related consignees from CEP.

II. Commerce's Rejection of the Constructed Value "Profit Cap"

A. Background

Profit is a component in the calculation of CV. *See* 19 U.S.C. § 1677b(e)(2)(1994). Under the current statute, as amended by the URAA, the preferred method for measuring profit is to add to CV "the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review * * * for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country[.]" 19 U.S.C. § 1677b(e)(2)(A).

If data are not available with respect to § 1677e(2)(A), then Commerce may select one of the following three alternative methods for calculating profit:

> (i) the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review * * * for profits, in connection with the production and sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise,
>
> (ii) the weighted average of the actual amounts incurred and realized by exporters or producers that are subject to the investigation or review (other than the exporter or producer described in clause (i)) * * * for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country, or
>
> (iii) the amounts incurred and realized * * * for profits, based on any other reasonable method, *except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers (other than the exporter or producer described in clause (i)) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise*[.]

19 U.S.C. § 1677b(e)(2)(B)(emphasis provided); *see also* Statement of Administrative Action, H.R. Doc. No. 103–316, 103rd Cong., 2nd Sess. (1994), reprinted in URUGUAY ROUND AGREEMENTS ACT, LEGISLATIVE HISTORY, Vol. VI, at 840 ("SAA")(stating that "new section [1677b(e)(2)(B)] does not establish a hierarchy or preference among these alternative

methods").[10] The underlined portion of alternative (iii) is known as the "profit cap." *See* SAA at 840.

Commerce rejected alternative (ii) because there was no data concerning foreign like product sold in the "ordinary course of trade" as required by the provision. *See* Def.'s Mem. in Partial Opp'n to Def.-Intervenors' Mot. for J. on the Agency R. at 26–27; *see also* 19 U.S.C. § 1677b(e)(2)(B)(ii). The "ordinary course of trade" test requires, among other conditions, that the sales are profitable (i.e., not made at below-cost prices). *See* 19 U.S.C. § 1677(15)(A)(1994); *see also* SAA at 840. Unlike the preferred methodology and alternative (ii), however, alternatives (i) and (iii) do not require the amount for profit to be calculated based on home country sales of a foreign like product in the ordinary course of trade. *See* 19 U.S.C. §§ 1677b(e)(2)(B)(i) & (iii). Instead, alternatives (i) and (iii) simply require that the calculation for profit be based on home country sales of "merchandise in the same general category of products as the subject merchandise." *Id.*

In calculating profit for CV, Commerce selected alternative (iii) and applied it on the basis of "the facts available." *See* Final Results at 53,302 (citing SAA at 841). Commerce explained that it interprets CV as requiring a positive amount for profit. *See id.* at 53,301–302. Because home market sales of the same general category of merchandise as flowers were made at below-cost prices, Commerce reasoned it could not calculate a positive profit cap. *See id.* Where a positive profit cap cannot be measured, Commerce interpreted the SAA as allowing it to disregard alternative (i) and the alternative (iii) profit cap and apply alternative (iii) on the basis of "the facts available." *See id.* at 53,302 (citing SAA at 841). As "the facts available," Commerce assigned a profit rate of five percent (of the sum of general expenses and cost), which it obtained from Compania Nacional de Chocolates S.A., a Colombian producer of chocolate, coffee, and dairy products. *See id.* at 53,301.

Asocolflores argues that Commerce's ruling that the profit cap contained in alternative (iii) does not apply is contrary to the statute's intent, and thus, must be reversed under the first prong of *Chevron*. *See* Asocolflores Br. at 17. According to Asocolflores, the profit cap is mandatory, requiring "that the amount allowed for profit may not exceed the amount normally realized by exporters or producers * * * in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise[.]" *See id.* at 20 (citing 19 U.S.C. § 1677b(e)(2)(B)(iii)).

Asocolflores demonstrates that numerous respondents made sales in Colombia of "merchandise that is in the same general category of prod-

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[10] The Statement of Administrative Action represents "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements * * *." SAA at 656. "[I]t is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement." *Id.* (quoted in *Delverde, SrL v. United States*, 21 CIT ___, ___, 989 F. Supp. 218, 229–30 n.18 (1997)).

uct as the subject merchandise,"[11] and neither Commerce nor FTC dispute this claim. Moreover, all such producers indicated in their questionnaires that the home market sales of other export quality flowers were made below-cost. *See* Asocolfores Br. at 18–19 (and citations at n. 18). Therefore, Asocolflores contends, the profit amount normally realized by producers for sales in Colombia of merchandise in the same general category of products as the subject merchandise is zero. *See id.* at 20.

B. Analysis

This Court must determine whether Commerce's decision to reject the profit cap during the period of review is in accordance with law. The plain language of alternative (iii) indicates that the profit cap is a mandatory requirement of that provision. Again, that section states that Commerce will add to CV "the amounts * * * realized * * * for profits, based on any other reasonable method, except that the amount allowed for profit may not exceed the amount normally realized by * * * producers" in connection with home market sales of "merchandise that is in the same general category of products as the subject merchandise." 19 U.S.C. § 1677b(e)(2)(B)(iii). Commerce, however, justified its rejection of the profit cap by reference to language in the SAA, which states,

> The Administration also recognizes that where, due to the absence of data, Commerce cannot determine amounts for profit under alternatives (1) and (2) or a "profit cap" under alternative (3), it might have to apply alternative (3) on the basis of "the facts available." This ensures that Commerce can use alternative (3) when it cannot calculate the profit normally realized by other companies on sales of the same general category of products.

SAA at 841.

The question of whether Commerce properly rejected the profit cap hinges on Commerce's determination that the statute is ambiguous as to whether it requires a positive amount for profit. If the language of § 1677b(e)(2)(B)(iii)—in light of its legislative history, structure, and the canons of construction—is ambiguous, Commerce may reasonably interpret it as requiring a positive profit amount for CV. Commerce could then permissibly reject the profit cap and resort to the facts available because it could not calculate a positive amount for profit. If, however, Congress intended that alternative (iii) would not require a positive amount for profit, then Commerce's rejection of the profit cap is impermissible.

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[11] The flowers subject to the current review are carnations, miniature carnations, pompons, and mums. Asocolflores demonstrates that numerous Colombian producers made sales in Colombia of export quality flowers other than those subject to the antidumping order, including roses, alstroemeria, gypsophia, gerbera, and statice, among others. *See* Asocolflores Br. at 18–19 (citing, e.g., Inverpalmas July 11, 1996 Response (Conf. Doc. 60) at 55; Manjui July 11, 1996 Response (Conf. Doc. 68) at 50–51; Flores de Suba July 12, 1996 Response (Conf. Doc. 99) at D–55 to D–56; Flores de la Sabana July 12, 1996 Response (Conf. Doc. 87) Sec. D at 39; Agricola Bonanza July 11, 1996 Response (Conf. Doc. 41) at 51–52; Industrial Agricola Aug. 15, 1996 Response (Conf. Doc. 149) Sec. D, Field 10.0. Because alstroemeria, gypsophila, and gerbera were within the scope of the original antidumping order, *see Certain Fresh Cut Flowers From Colombia*, 52 Fed. Reg. 6,842, 6,843 (Dep't Commerce Mar. 5, 1987)(final determination), they are in the "same general category of products as the subject merchandise" in the ninth review.

The SAA explicitly states that Commerce may resort to "the facts available" under alternative (iii) "due to the absence of data." *Id.* If Congress intended that the actual amount of profit be zero where all sales are made below cost, then this is not a situation where data is absent because Asocolflores has pointed to undisputed record evidence indicating that numerous Colombian producers made home market, below-cost sales of flowers in the same general category as the subject flowers. Commerce would then apply the profit cap as demonstrated by Asocolflores, using a profit rate of zero for the below cost sales of export quality flowers.

Therefore, the precise question before the Court is whether Commerce's determination that alternative (iii) of 19 U.S.C. § 1677b(e)(2)(B) may require a positive amount for profit is in accordance with law. In reviewing Commerce's interpretation, the Court employs the two-step analysis of *Chevron*.

Under the first prong of *Chevron*, the Court asks whether Congress's purpose and intent on the question at issue is judicially ascertainable. *See Timex*, 157 F.3d at 881. Commerce based its interpretation of a positive profit amount requirement on language from the SAA. Commerce explained,

> Although the URAA eliminated the use of a minimum profit rate, the presumption of a profit element in the calculation of CV was not eliminated. The SAA [at page 839] states: "Because constructed value serves as a proxy for a sales price, and because a fair sales price would recover SG&A expenses and would include an element of profit, constructed value must include an amount for SG&A expenses and for profit."

Final Results at 53,301 (citing SAA at 839). Although the above statement could possibly be interpreted in isolation as requiring a positive amount for profit, the Court is not persuaded by Commerce's reliance on it alone in light of the statute's language, legislative history, and structure. *See United States v. Taylor*, 487 U.S. 326, 344–46 (1988)(concurring opinion of Justice Scalia)(stating that reliance upon an isolated excerpt from a statute's legislative history is indeterminate and result-oriented). The Court affords the plain language of the statute the most weight. *See Timex*, 157 F.3d at 882. If the provision's text does not resolve the issue, the Court conducts a more thorough examination of the statute's legislative history and structure, employing the canons of statutory construction, to determine whether Congress's intent is otherwise clearly discernible. *See id.*

1. The Statute's Language

Although the text of § 1677b(e)(2)(B)(iii) is not explicit as to whether it requires a positive amount for profit in CV, its language impliedly contradicts such a conclusion. Unlike both the preferred methodology and alternative (ii), alternative (iii) does not require that the sales from which profit is calculated be in "the ordinary course of trade." *See* 19 U.S.C. § 1677b(e)(2)(B)(iii). The "ordinary course of trade" test requires

that the sales are profitable (i.e., not made at below cost prices).[12] *See* 19 U.S.C. § 1677(15)(A). "It is well established that where Congress has included specific language in one section of a statute but has omitted it from another, related section of the same Act, it is generally presumed that Congress intended the omission." *Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, 13 F.3d 398, 401 (Fed. Cir. 1994). That Congress specifically required the sales for the preferred methodology and alternative (ii) to be profitable, but did not require alternative (iii) sales to be profitable, undermines Commerce's conclusion that the amount allowed for profit in alternative (iii) must be positive.

Statements in the SAA add support to the conclusion that Congress did not intend to require alternative (iii) sales to be profitable. After discussing alternative (iii), the SAA states that, "the Administration does not intend that Commerce would engage in an analysis of whether sales in the same general category are above-cost or otherwise in the ordinary course of trade." SAA at 841. Alternative (iii) bases its calculation on "sales in the same general category;" thus, Congress intentionally permitted sales serving as alternative (iii)'s basis for calculation to be below cost. Moreover, the SAA discussion of § 1677b(e)(2) indicates that Congress was aware that where sales are below cost, profit is zero. *See* SAA at 839 ("Moreover, Commerce has used an average profit rate, which includes *below-cost sales for which the profit is zero.*")(emphasis provided). That Congress did not require alternative (iii) sales to be profitable undermines Commerce's conclusion that the amount allowed for profit in alternative (iii) must be positive.

2. Legislative History

A further look into the legislative history adds support to Asocolflores' position. The URAA amendments significantly changed the statute's calculation of CV. The previous provision included a minimum profit amount of eight percent of the sum of the general expenses and cost. *See* 19 U.S.C. § 1677b(e)(1)(B)(ii)(1988). The URAA amendments eliminated the minimum profit amount, introducing the preferred methodology and the three alternatives as the bases for profit calculation. The House Report to the URAA states that the CV calculation was "amended to reflect more specifically the obligations of the Agreement[,]" referring to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping)("Agreement"). H. Rep. No. 103–826(I), 103rd Cong., 2nd Sess. at 95

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[12] Although the ordinary course of trade test requires more than that the sales be profitable, Congress clearly was cognizant of this condition when amending the CV profit calculation because Congress amended the definition of "ordinary course of trade" under the URAA to specifically exclude below cost sales. *See* 19 U.S.C. § 1677(15)(1994)(referencing 19 U.S.C. § 1677b(b)(1)(1994)); *see also* SAA at 834 ("Section 222(h) of the bill amends section [1677(15)] to specify additional types of transactions that Commerce may consider to be outside the ordinary course of trade, including: (1) sales disregarded as being below-cost[.]"). Moreover, in discussing alternative (ii) of the CV profit calculation, the SAA states, "although it relies on the sales experience of other companies, this alternative requires the use of sales in the ordinary course of trade, *i.e.*, profitable sales." SAA at 840.

(1994). Indeed, the language of the amended provision, § 1677b(e)(2) closely mirrors the language of Article 2.2.2 of the Agreement.[13]

During the negotiations that provided the foundation for the Agreement's CV calculation, "[t]he focus of the debate was whether statutory minimums for profit and general selling and administrative expenses, such as those employed by the United States, were consistent with the Agreement or whether perhaps actual data for expenses and profit should be explicitly required by the Code provisions." THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY Vol. II at 1554 (Terence P. Stewart ed., 1993). Korea, Hong Kong, Singapore, Japan, and the Nordic countries, among others, "expressed the position that the general expenses and profit used for purposes of calculating the constructed value should be determined on the basis of the company's *actual* data in all cases where it is possible." *Id.* at 1557–58.

The final version of the Agreement did not include a minimum profit figure, and therefore, to specifically reflect the obligations of the Agreement, Congress eliminated the minimum profit requirement from its own statute. *See* 19 U.S.C. § 1677b(e)(2). Commerce maintains that alternative (iii) requires a positive profit amount in CV—even where actual data indicate below cost sales in the home market of merchandise that is in the same general category of products as the subject merchandise. To require a positive amount for profit, in essence, would still enforce a minimum. Commerce's interpretation, therefore, violates the spirit of Congress's intention to eliminate a profit minimum for CV in favor of actual data to conform with the Agreement.

3. The Statute's Structure

Finally, the Court examines the statute's structure. Again, alternative (iii) requires that Commerce add to CV "the *amounts* incurred and realized for selling, general, and administrative expenses, and for profits, based on any other reasonable method, except that the *amount* allowed for profit may not exceed the *amount* normally realized[.]" 19 U.S.C. § 1677b(e)(2)(B)(iii)(emphasis provided).

The antidumping statute contains numerous provisions requiring Commerce to adjust for the "amount" of various expenses. *See, e.g.*, 19 U.S.C. §§ 1677a(c) & (d), 1677b(a)(6) & (7)(B). When the "amount" of such expenses is zero or negative, Commerce makes a zero or negative

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[13] Article 2.2.2 of the Agreement provides,

> [T]he amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:
>
> (i) the actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;
>
> (ii) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;
>
> (iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.

adjustment.[14] The Court presumes that the same words used twice in the same act have the same meaning. *See ICC Industries, Inc. v. United States*, 812 F.2d 694, 700 (Fed. Cir. 1987). Therefore, the requirement of a positive amount for profit in § 1677b(e)(2)(B)(iii) is presumptively negated where the record indicates that profitable sales do not exist.

Moreover, Commerce's treatment of profit is inconsistent with respect to the calculations of CV and CEP. To calculate the amount of profit to be deducted from CEP pursuant to § 1677a(d)(3), Commerce must calculate "total actual profit." *See* 19 U.S.C. § 1677a(f)(2)(D). For the current review, Commerce interpreted "total actual profit" to include profits on home market sales and U.S. market sales. *See Memorandum: Calculation Methodology for CEP Profit in the Ninth Antidumping Administrative Review of Certain Fresh Cut Flowers from Colombia* (Pub. Doc. 438)(Mar. 20, 1997) at 1. In addition, Commerce addressed whether non-profitable home market sales would be used as the basis for home market profit in calculating "total actual profit" pursuant to § 1677a(f)(2)(D). *See id.* at 2. Commerce concluded that "there is no provision in the statute for disregarding sales below cost in this context, and doing so would conflict with the statutory requirement to use 'actual profit.'" *Id.* Thus, for purposes of calculating "total actual profit," Commerce recognizes that the actual profit of below cost sales in the home market is zero.

Commerce's incongruous treatment of home market profit for CV and CEP is inconsistent with Congress's intent. As noted, there is a presumption that the same words used twice in the same act have the same meaning. *ICC Industries*, 812 F.2d at ____. To interpret the actual profit incurred for below cost sales in the home market for purposes of CEP to be zero, while denying that the profit "amount normally realized" can be zero for purposes of the CV profit cap in alternative (iii), violates the presumption that home market profit will have the same meaning for both sections.

Moreover, § 1677b(a) states that, "[in] determining under this title whether subject merchandise is being, or is likely to be, sold at less than fair value, a fair comparison shall be made between the export price or constructed export price and normal value." 19 U.S.C. § 1677b(a). It seems hardly fair for Commerce to interpret actual profits of below cost sales in the home market to be zero for purposes of CEP while denying that the same actual profit may be zero for purposes of CV. Such an interpretation appears inconsistent with Congress's specific intent to make a fair comparison between the home market price and the export price.

C. Conclusion

Commerce's determination that 19 U.S.C. § 1677b(e)(2)(B)(iii) may reasonably be interpreted to require a positive amount for profit is in-

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[14] For example, the "amount" of credit expenses can be negative when the customer prepays. Commerce then reduces the U.S. price by a negative amount, thereby increasing the price. *See* 19 U.S.C. § 1677a(d)(1)(B); *see also Silicon Metal from Brazil*, 62 Fed. Reg. 1970, 1977–78 (Jan. 14, 1997); *Industrial Nitrocellulose from Brazil*, 55 Fed. Reg. 23,120, 23,122 (June 6, 1990)(stating that, where the customer prepays, the "credit expense result[s] in a negative amount").

consistent with Congress's intent, and therefore, not in accordance with law. The Court recognizes that Commerce is to be accorded substantial deference in interpreting the antidumping laws. *See Torrington Co. v. United States*, 68 F.3d 1347, 1351 (Fed. Cir. 1995)(citing *Daewoo Elecs. Co. v. Int'l Union*, 6 F.3d 1511, 1516 (Fed. Cir. 1993), *cert. denied*, 512 U.S. 1204 (1994)). Moreover, the Court acknowledges the SAA statement upon which Commerce relied in interpreting the CV provision as mandating a positive amount for profit. *See* SAA at 839 ("Because constructed value serves as a proxy for a sales price, and because a fair sales price would recover SG&A expenses and would include an element of profit, constructed value must include an amount for SG&A expenses and for profit.").

Here, however, upon examination of the statute's language, legislative history, and structure, it is clear that Congress did not intend 19 U.S.C. § 1677b(e)(2)(B)(iii) to require a positive amount for profit where all available data demonstrate that sales in the same general category were made at below cost. To the contrary, the *Chevron* step one analysis indicates that: 1) Congress intended to eliminate the profit minimum from the CV calculation in favor of actual amounts; 2) Congress intended that where sales are not made in the ordinary course of trade, they are not profitable; 3) Congress understood that where sales are not profitable, the actual amount of profit is zero; and 4) Congress intended that a fair comparison be made between the home market and U.S. prices. While the CV provision may presume a positive amount for profit, it is clear that new URAA provision 19 U.S.C. § 1677b(e)(2)(B)(iii) does not mandate the creation of a positive amount where all available evidence indicate non-profitable sales.

The record indicates that numerous Colombian producers made home market sales of the same general category of merchandise at below cost prices. Therefore, pursuant to § 1677b(e)(2)(B)(iii), the profit "normally realized" is zero, and zero is thus the profit cap. The Court remands the matter to Commerce for an application of the statute consistent with this standard.

III. Commerce's Treatment of Imputed Credit Expense

Credit expenses are the costs of financing sales accounts receivables. Imputed credit expenses, therefore, represent the amounts Commerce attributes to interest expenses incurred between shipment date and payment date. *See Koenig & Bauer-Albert AG v. United States*, 22 CIT ____, ____, 15 F. Supp.2d 834, 841 (1998).

Asocolflores argues that, because Commerce included all interest expenses in CV, while subtracting the imputed cost of credit from the EP and CEP, Commerce violated the statutory requirement of a fair comparison. *See* Asocolflores Br. at 29 (citing 19 U.S.C. § 1677b(a) and the Agreement, Art. 2.4). Asocolflores maintains that, "unless the statute expressly provides otherwise, if the export price is adjusted for an

item of expense, normal value must also be adjusted for that item of expense." *Id.* Therefore, according to Asocolflores,

> To comply with the statute's requirement of a fair comparison, Commerce must either (i) exclude from CV that portion of actual financial expenses attributable to sales (by subtracting from net financial expenses an amount determined by multiplying net financial expenses by the ratio of accounts receivable over total assets, as was its practice prior to the URAA), or (ii) subtract an amount for imputed credit from CV, as a circumstances of sale adjustment pursuant to 19 U.S.C. § 1677b(a)(6)(C)(iii), as it has done in more recent cases.

Id. at 32.

Commerce specifically stated in the Final Results, however, that "[a]ny differences in credit expense between the U.S. and foreign market are taken into account as a circumstance of sale adjustment[.]" Final Results at 53,300. The statute requires that constructed value be "increased or decreased by the amount of any difference * * * between the [U.S. Price] and [CV] * * * that is established to the satisfaction of the administering authority to be wholly or partly due to * * * differences in the circumstances of sale." 19 U.S.C. § 1677b(a)(6)(C). This Court has previously held that Commerce's treatment of imputed interest expenses as a circumstance of sale is in accordance with law. *See Koenig & Bauer-Albert*, 22 CIT at ___, 15 F. Supp.2d at 842. Therefore, Commerce's method for accounting for differences in credit expense treatment between CV and EP (and CEP) is in accordance with the statute's fair comparison requirement. The Court is unable to discern from the record, however, whether Commerce in fact did account for differences in credit expenses as a circumstance of sale.[15]

Asocolflores further contends that Commerce failed to exclude credit expenses associated with sales of subject flowers to the United States and third countries from CV. *See* Reply Br. of Def.-Intervenors in Supp. of Mot. for J. on the Agency R. ("Asocolflores Reply Br.") at 10. Asocolflores points to the questionnaire Commerce sent to respondents, which requests "*total* financial expenses * * * incurred in connection with the production and sale of *all* products." *See* Asocolflores Br. at 29–30 (citing Dep't of Commerce Questionnaire (Pub. Doc. 42)(May 16, 1996) at D–39). The statute requires that CV only include those selling, general, and administrative ("SG&A") expenses incurred "in connection with the production and sale of a foreign like product * * * *for consumption in the foreign country*[.]" 19 U.S.C. § 1677b(e)(2)(A)(emphasis provided). Therefore, to the extent that Commerce includes credit expenses in connection with United States and third market sales in SG&A, that calculation would not be in accordance with law.

Commerce counters, however, that it did not include credit expenses to all markets in the CV calculation, but properly limited such expenses

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[15] At oral argument on January 12, 1999, counsel for Commerce cited certain adjustments to EP, but nevertheless was unable to confirm that the appropriate adjustments were made.

to home market consumption. *See* Def.'s Mem. in Partial Opp'n to Def.-Intervenors' Mot. for J. on the Agency R. at 40. According to Commerce, it treats credit expenses as a type of "selling expense" for purposes of SG&A. *See id.* at 39. In the Preliminary Results, Commerce explained that, "[r]egarding selling expenses, all respondents reporting sales of export quality flowers in the home market stated they had no selling expenses in that market. Therefore, as facts otherwise available, we did not include selling expenses for those respondents that had no home market sales." *Certain Fresh Cut Flowers From Colombia*, 62 Fed. Reg. 16,772, 16,777 (Dep't Commerce April 8, 1997)(preliminary results). Thus, according to Commerce, because it did not include selling expenses in the calculation of SG&A, Commerce did not include credit expenses to all markets in SG&A. *See* Def.'s Mem. in Partial Opp'n to Def.-Intervenors Mot. for J. on the Agency R. at 39–40.

"The orderly functioning of the process of review[, however,] requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943). Commerce does not cite to record evidence confirming that it indeed accounted for differences in CV and EP (and CEP) as a circumstance of sale and treated credit expenses as "selling expenses" for purposes of SG&A. The Court requires a more detailed account with citations to record evidence to sustain Commerce's arguments. Therefore, the Court remands the matter to Commerce to provide a more detailed explanation of (1) whether it accounted for differences in credit expenses as a circumstance of sale and (2) its treatment of credit expenses to United States and third markets for the purpose of CV.

IV. Commerce's Decision to Exclude Antidumping Surcharges Paid to Unrelated Consignees from CEP

Colombian producers sell most of their flowers in the United States on a consignment basis. Following the entry of the antidumping duty order in 1987, numerous consignees of subject flowers from Colombia began a practice of raising their United States prices by a surcharge to cover the antidumping duties. Asocolflores explains that such importers include an additional line item on their invoices that they refer to as an antidumping duty surcharge, "so that they can pay to Customs the amounts of estimated antidumping duty deposits and any actual antidumping duty assessments." *See* Asocolflores Br. at 33 (citing, e.g., Maxima July 12, 1996 Response (Pub. Doc. 78) at 3, 47).

During the period of review, Commerce decided to deduct the antidumping duty surcharge from the United States price in calculating CEP for *un*affiliated consignees. *See* Final Results at 53,293. Commerce explained that, where the Colombian producer/exporter and consignee are not related,

> the payment to the consignment reseller for [antidumping] reserve surcharges does not accrue to [the producer/exporter]. Therefore, we have taken as our starting price the price charged by the unaffiliated consignment seller net of the [antidumping] reserve surchar-

> ge. This differs from our treatment of [antidumping] surcharges paid to affiliated consignment sellers, where the [antidumping] surcharge can be said to accrue to the affiliated producer/exporter.

Id. Thus, Commerce interprets the statute as requiring the inclusion of antidumping surcharges in CEP where the producer/exporter and consignee are unrelated. In reviewing Commerce's interpretation, the Court employs the two-step analysis of *Chevron*.

The statute provides that,

> The term "constructed export price" means the price at which the subject merchandise is first sold * * * in the United States * * * by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, as adjusted under subsections (c) and (d).

19 U.S.C. § 1677a(b).

Commerce does not argue that antidumping surcharges are a cost to be adjusted pursuant to either subsection (c) or (d) of § 1677a. *See* Def.'s Mem. in Partial Opp'n to Def.-Intervenors' Mot. for J. on the Agency R. at 42. Rather, Commerce argues that it deducts antidumping surcharges charged by unaffiliated consignees because such charges are not a component of the "starting price" defined in § 1677a(b). *See id.* Commerce predicates its argument on Commerce's finding that, in the case of an unaffiliated consignee, the antidumping surcharge "does not accrue" to the producer exporter. *See id.* at 41 (citing Final Results at 53,293). Because the producer/exporter "did not receive or control the funds which comprised the [antidumping] reserve surcharge," Commerce argues, "it is apparent that the surcharge is not part of 'the price * * * at which the subject merchandise is first sold * * * by or for the account of the producer or exporter * * *.'" *Id.* (citing 19 U.S.C. § 1677a(b)).

The plain language of § 1677a(b) does not expressly require that the components of the "price at which the subject merchandise is first sold * * * in the United States" accrue to the producer. Commerce appears to argue that the "for the account of the producer or exporter" phrase expresses the requirement. *See id.* In rebuttal, Asocolflores contends that,

> The condition 'for the account of the producer' modifies the verb 'sold,' not the noun 'price,' and the unaffiliated consignee plainly sold the flowers 'for the account of the producer.' Indeed, in a consignment transaction, the consignee does not ever take title to the flowers, and thus has nothing to sell for its own account. Rather, the unaffiliated consignee acts as [the producer's] agent.

Asocolflores Reply Br. at 14–15. In the context of a consignment arrangement, the "for the account of" language is not so ambiguous as to support Commerce's conclusion that it may reasonably interpret the statute as requiring all price components to accrue to the producer/exporter to be deemed elements of the starting price.

Moreover, Commerce's accrual requirement is inconsistent with the provision's language as a whole. Section 1677a enumerates numerous

expenses, included in the starting price, that do not accrue to the producer, including international air freight, Customs' clearance fees, selling expenses, and other charges. Congress specifically required that these expenses be deducted from CEP in subsections (c)(2) and subsection (d). *See* 19 U.S.C. § 1677a(c)(2)–(d). Again, as these expenses comprise part of the starting price, they are included in the starting price. Therefore, if, as Commerce contends, Congress intended to restrict the CEP starting price to components of that price that actually accrue to the producer, the adjustments provided for in subsections (c)(2) and (d) would be superfluous. The canons of statutory construction provide that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant[.]" SUTHERLAND STAT CONST § 46.06 (5th ed. 1992). Commerce's interpretation of the provision would render its subsections superfluous; therefore, the Court concludes that Commerce's interpretation is contrary to Congress's intent.

Finally, the SAA provides that, "constructed export price will be calculated by reducing the price of the first sale to an unaffiliated customer in the United States by the amount of the following expenses[.]" SAA at 823. The price of the first sale in the United States includes the antidumping surcharge, and the surcharge is not listed as one of the adjusted expenses. Therefore, the legislative history indicates that the CEP should include the antidumping surcharge.

The statute's language and legislative history, examined according to the accepted canons of construction, indicate that Congress intended to include antidumping surcharges in the starting price whether or not the consignee is related to the producer/exporter. Therefore, Commerce's application of the provision is not in accordance with law. The Court remands for a determination consistent with Congress's intended meaning.

V. Commerce's Decision Not to Employ the Net Monetary Correction in Calculating CV

For the current review, Commerce requested and respondents provided information regarding the monthly net correction gain or loss reflected in the respondents' financial statements. *See* Questionnaire (Pub. Doc. 42)(May 16, 1996) at D–40. The monetary correction "represents the net gain or loss to [a] company caused by inflation on its net exposed monetary assets and liabilities[.]"[16] Final Results at 53,299. According to Asocolflores, Colombian law requires companies to use the net monetary correction to adjust their financial expenses as a generally accepted accounting principle ("GAAP"). *See* Final Results at 53,299.

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[16] The net monetary correction equals the difference between monetary assets and liabilities, multiplied by the inflation rate. Gains result from inflation's effect on monetary liabilities, such as accounts payable. Losses are generated as inflation erodes the value of monetary assets, such as cash.

In calculating costs for the purposes of CV, the antidumping statute provides that,

> Costs shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise.

19 U.S.C. § 1677b(f)(1)(A)(1994).

In the current review, Commerce applied the Colombian net monetary correction in calculating the depreciation and amortization expense for CV, but rejected the adjustment in calculating financial costs. *See* Final Results at 53,299–300. Asocolflores argues that the new statutory provision requires Commerce to use Colombian GAAP unless it makes a specific finding that Colombian GAAP does not "reasonably reflect the costs associat[ed] with the production and sale of the merchandise." *See* Asocolflores Br. at 38–39 (citing 19 U.S.C. § 1677b(f)(1)(A)). Therefore, Asocolflores contends that, because Commerce did not make a specific finding that the net monetary correction unreasonably distorted or misstated financial costs for purposes of the CV calculation, Commerce was required to adjust the respondents' financial expenses for the inflation correction. *See* Asocolflores Br. at 39.

Commerce argues that it recognized the statute's requirement that costs normally be calculated in accordance with a company's records kept pursuant to the home country's GAAP, but did not adjust for the monetary correction of respondents' financial expenses because that correction did not pertain to the cost of flower *production*. *See* Def.'s Mem. in Partial Opp'n to Def.-Intervenors' Mot. for J. on the Agency R. at 45–46. Thus, Commerce interprets § 1677b(f)(1)(A) as being limited to production costs.[17] The Court reviews Commerce's interpretation to determine whether it is in accordance with law.

For the fifth, sixth, and seventh reviews, this Court sustained Commerce's rejection of the monetary correction for Asocolflores' financial expenses in calculating CV "[b]ecause the monetary correction does not relate to flower *production*." *Asociacion*, 22 CIT at ____, 6 F. Supp.2d at 876. That decision, however, concerned Commerce's practice under the pre-URAA statute. Prior to the enactment of the URAA, Commerce's practice was "to adhere to an individual firm's recording of costs in accordance with GAAP of its home country if * * * satisfied that such principles reasonably reflect the costs of *producing* the subject

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[17] In the Final Results, Commerce explained that "the statute merely requires that [Commerce] include in its calculation of CV the cost of manufacturing 'which would ordinarily permit the production of the merchandise in the ordinary course of business.'" Final Results at 53,300. In making this assertion, however, Commerce only cites 19 U.S.C. § 1677b(e)(1) as authority. *See id.* Section 1677b(e)(1) provides that one of the components of CV is the "cost of materials and fabrication * * * employed in producing the merchandise[.]" 19 U.S.C. § 1677b(e)(1). Commerce fails in its discussion, however, to acknowledge § 1677b(e)(2), which provides that selling, general, and administrative expenses are also included in CV, and § 1677b(f)(1)(A), the relevant section at issue.

merchandise."[18] *Certain Fresh Cut Flowers From Colombia*, 61 Fed. Reg. 42,833, 42,846 (Dep't Commerce Aug. 19, 1996)(emphasis provided); *see also Furfuryl Alcohol From South Africa*, 60 Fed. Reg. 22,550, 22,556 (Dep't Commerce May 8, 1995); *Silicon Metal From Brazil*, 56 Fed. Reg. 26,977, 26,986 (Dep't Commerce June 12, 1991).

This court has upheld Commerce's practice as limited to production costs. *See, e.g., Thai Pineapple Public Co., Ltd. v. United States*, 20 CIT ____, ____, 946 F. Supp. 11, 18 (1996), *appeal docketed*, No. 97–1437 (Fed. Cir. May 15, 1997); *Micron Technology, Inc. v. United States*, 19 CIT 829, 833, 893 F. Supp. 21, 28,(1995); *Camargo Correa Metais, S.A. v. United States*, 17 CIT 897, 898 (1993). *But cf. Laclede Steel Co. v. United States*, 18 CIT 965, 975 (1994)(characterizing Commerce's practice as used in connection with the firm's "financial position or actual costs"); *Ipsco, Inc. v. United States*, 22 CIT ____, ____, 701 F. Supp. 236, 238, n.3 (1988).

The current provision, however, is clearly not limited to production costs. Nineteen U.S.C. § 1677b(f)(1)(A) adopted and enhanced Commerce's pre-URAA practice, clarifying that Commerce will calculate costs based on the records of the producer where such records are in accordance with the home country's GAAP and "reasonably reflect the costs associated with the production *and sale* of the merchandise." (Emphasis provided.) Moreover, in discussing § 1677b(f)(1)(A), the SAA states that "[c]osts shall be allocated using a method that reasonably reflects and accurately captures all of the actual costs in producing *and selling* the product under * * * review." SAA at 835 (emphasis provided). Accordingly, because the statute's language and legislative history indicate that Congress did not intend to limit § 1677b(f)(1)(A) to production costs, Commerce's interpretation of the provision is not permissible under the first prong of *Chevron*.

The proper question, then, is whether the respondents' financial costs relate to the production and sale of the subject flowers. If so, Commerce would either have to apply the Colombian monetary correction or explain how it would distort these costs. *See Borden, Inc. v. United States*, 22 CIT ____, ____, 4 F. Supp.2d 1221, 1234 (1998)(holding that 19 U.S.C. § 1677b(f)(1)(A) "is conditional, requiring Commerce to use the company's own calculation only if satisfied with the accuracy of the cost representations they render.").

The SAA clearly recognizes that financial costs may relate to production costs in discussing § 1677b(f)(1)(A)'s scope:

> In determining whether to accept the cost allocation methods proposed by a specific producer, Commerce will consider the production cost information available to the producer and whether such information could reasonably be used to compute a representative

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[18] Commerce based its policy on the following excerpt from the House Report to the Trade Reform Act of 1973:

> [I]n determining whether merchandise has been sold at less than cost, [Commerce] will employ accounting principles generally accepted in the home market of the country of exportation if [Commerce] is satisfied that such principles reasonably reflect the variable and fixed costs of producing the merchandise.

H. Rep. No. 93–571, 93rd Cong., 1st Sess. at 71 (1973). *See Camargo Correa Metais, S.A. v. United States*, 17 CIT 897, 898 (1993).

> measure of the materials, labor and other costs, *including financing costs*, incurred to produce the subject merchandise, or the foreign like product. * * * Also, if Commerce determines that costs, *including financing costs*, have been shifted away from production of the subject merchandise, or the foreign like product, it will adjust costs appropriately, to ensure they are not artificially reduced.

SAA at 835 (emphasis provided).

In addition, Commerce itself has recognized that financial expenses in this review may relate to the production and sale of the subject flowers. As noted above, Commerce claims to treat credit expenses as a type of "selling expense" for purposes of SG&A. *See supra* p.30 (citing Def.'s Mem. in Partial Opp'n to Def.-Intervenors' Mot. for J. on the Agency R. at 39). Credit expenses are financial expenses. Therefore, financial expenses may be characterized as selling expenses.

Moreover, in its questionnaire to respondents, Commerce specifically requests "information regarding total financial expenses * * * incurred in connection with the *production and sale* of all products." Dep't of Commerce Questionnaire (Pub. Doc. 42)(May 16, 1996) at D–39. Therefore, it is clear that Commerce recognizes that financial expenses may relate to production and sale.

Therefore, unless Commerce can demonstrate that respondents' financial expenses do not relate to the production and sale of the subject flowers, Commerce must either apply the net monetary correction to the respondents' financing costs or explain how the adjustment distorts such costs. The Court remands for Commerce to make a determination consistent with this standard.

VI. Commerce's Calculation and Application of the CEP Profit Ratio

Nineteen U.S.C. § 1677a(d)(3) instructs Commerce to deduct the profit allocated to various U.S. selling expenses from CEP. Section 1677a(f) provides that "profit" for purposes of subsection (d)(3) is to be calculated by multiplying "total actual profit" by the ratio of "total United States expenses" to "total expenses" (the "CEP profit ratio"). *See* 19 U.S.C. § 1677a(f).[19]

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[19] 19 U.S.C. § 1677a(f) states,

(1) **In general**. For purposes of subsection (d)(3), profit shall be an amount determined by multiplying the total actual profit by the applicable percentage.

(2) **Definitions**. For purposes of this subsection:

(A) **Applicable percentage**. The term "applicable percentage" means the percentage determined by dividing the total United States expenses by the total expenses.

(B) **Total United States expenses**. The term "total United States expenses" means the total expenses described in subsection (d)(1) and (2).

(C) **Total expenses**. The term "total expenses" means all expenses in the first of the following categories which applies and which are incurred by or on behalf of the foreign producer and foreign exporter of the subject merchandise and by or on behalf of the United States seller affiliated with the producer or exporter with respect to the production and sale of such merchandise:

(i) The expenses incurred with respect to the subject merchandise sold in the United States and the foreign like product sold in the exporting country if such expenses were requested by the administering authority for the purpose of establishing normal value and constructed export price.

(ii) The expenses incurred with respect to the narrowest category of merchandise sold in the United States and the exporting country which includes the subject merchandise.

(iii) The expenses incurred with respect to the narrowest category of merchandise sold in all countries which includes the subject merchandise.

(D) **Total actual profit**. The term "total actual profit" means the total profit earned by the foreign producer, exporter, and affiliated parties described in subparagraph (C) with respect to the sale of the same merchandise for which total expenses are determined under such subparagraph.

A. Commerce's Decision Not to Include U.S. Credit Expenses in "Total Expenses"

In calculating the CEP profit ratio, Commerce did not include U.S. credit expenses in its calculation of "total expenses," but did include U.S. credit expenses in "total United States expenses." *See* Asocolflores Br. at 45. Asocolflores argues that by including U.S. credit expenses in "total United States expenses," but not in "total expenses," Commerce impermissibly over-allocated profit to "total United States expenses" in violation of the plain language of 19 U.S.C. § 1677a(f). *See id.* at 45–46.

As Asocolflores correctly demonstrates, credit expenses are included in "total United States expenses" under § 1677a(f)(2)(B) because credit expenses are deducted from CEP pursuant to § 1677a(d)(1)(B). *See id.* at 45. According to Asocolflores, credit expenses must also be included in "total expenses" because, pursuant to § 1677a(f)(2)(C)(i), "[t]he expenses incurred with respect to the subject merchandise sold in the United States" must necessarily include U.S. credit expenses. *See id.* at 46.

Commerce has provided no reasoned basis for its decision not to include U.S. credit expenses in "total expenses." Therefore, the Court remands to Commerce to reconsider this issue.

B. Commerce's Decision Not to Deduct Credit Expense from "Total Actual Profit"

According to Asocolflores, Commerce did not deduct credit expense in calculating "total actual profit." *See* Asocolflores Br. at 46. Asocolflores reasons that, since credit expense is considered a United States expense, it must also be treated as an expense for purposes of calculating "total actual profit." *See id.* "It makes no sense to allocate profit to credit expense while not considering credit an expense for purposes of calculating that profit." *Id.*

The Court is unable to discern from the record whether Commerce in fact did fail to calculate "total actual profit" net of credit expenses. Moreover, Commerce has not provided a reasoned response to Asocolflores' argument. Therefore, the Court remands the matter, instructing Commerce to reconsider and explain its treatment of credit expenses in calculating "total actual profit."

C. Commerce's Decision to Compute the CEP Profit Ratio on an Annual Rather Than on a Monthly Basis

For purposes of CEP profit under 19 U.S.C. § 1677a(f), Commerce calculated the rate on an annual, rather than on a monthly, basis. *See* Final Results at 53,295. As Asocolflores concedes, neither the provision nor its legislative history indicates Congress's specific intent with regard to the time period over which the CEP profit rate is to be allocated. *See* Asocolflores Br. at 48. Therefore, the Court reviews whether Commerce's construction is reasonable under the second prong of *Chevron*.

Asocolflores argues that Commerce's use of an annual rate is unreasonable "because it does not fulfill the purpose of the statute of equili-

brating constructed export price with export price." *See* Asocolflores Br. at 48–49 (citing SAA at 823 ("The deduction of profit is a new adjustment in U.S. law, consistent with the language of the Agreement, which reflects that constructed export price is now calculated to be, as closely as possible, a price corresponding to an export price between non-affiliated exporters and importers.")). Asocolflores points out that, due to specific flower-giving holidays, the demand for fresh cut flowers in the United States—and consequently the profits arising therefrom—vary significantly from month-to-month. *See id.* at 49. Therefore, Asocolflores contends, "[t]he resulting constructed export price does not resemble 'as closely as possible' contemporaneous export prices, because the profit rate on export prices also vary with flower-giving holidays, and are not constant year-round." *Id.* at 50.

Asocolflores' argument is not persuasive. First, as FTC argued before Commerce, an average rate of profit still inherently accounts for monthly variation. *See* Final Results at 53,295. Second, Asocolflores fails to explain how use of an annual profit rate for CEP violates the statute's objective of corresponding CEP with EP.

Asocolflores also contends that Commerce failed to provide a reasoned response for its decision. *See* Asocolflores Br. at 51. The Court disagrees. In the Final Results, Commerce pointed out that the CEP profit calculation, as defined by § 1677a(f), "is not intended to be based on the profit of particular U.S. sales." Final Results at 53,295. Moreover, based on the provision's use of the term "total actual profit," Commerce explained that it interprets the statute to normally require an overall profit for home market and United States sales. *See id.* Therefore, Commerce "use[s] an average profit rate for those U.S. and home market sales that were made." *Id.*

Nineteen U.S.C. § 1677a(f) explains that CEP profit is to be calculated by multiplying "total actual profit" by the ratio of "total United States expenses" to "total expenses." Both "total actual profit" and "total expenses" include data for both U.S. and home market sales. *See* 19 U.S.C. § 1677a(f)(2)(C) & (D). Therefore, Congress clearly did not intend for CEP profit to be based on U.S. sales alone. Morever, the Court finds Commerce's interpretation of "*total* actual profit" to indicate the presumption of a single profit rate to be reasonable. *Cf. Toyota Motor Sales, U.S.A., Inc. v. United States*, 22 CIT ____, ____, 15 F. Supp.2d 872, 891 (1998)(upholding Commerce's construction of 19 U.S.C. §§ 1677a(d)(3) and (f) as requiring a single, aggregated CEP profit even where there are multiple lines of subject merchandise and foreign like product). Therefore, based on the terms of the provision, the Court finds Commerce's interpretation to be reasonable.

The Court sustains Commerce's determination to calculate CEP profit as a single, annual rate.

VII. Commerce's Decision to Impute a Consolidated General and Administrative Expense Rate for All Farms of the HOSA Group in Calculating the Cost of Production for CV

"The HOSA Group consists of several related companies dedicated to the production and sale of fresh cut flowers[.]" *See* HOSA's July 12, 1996 Response (Pub. Doc. 75) at A–9. Only one of the HOSA Group companies, Innovacion Andina, S.A., performs bouquet operations on top of growing flowers subject to the antidumping duty order. *See id.* To make the bouquets, Innovacion Andina purchases flowers from non-HOSA Group farms. *See* Asocolflores Br. at 52. For purposes of the ninth administrative review, Commerce treated the farms of the HOSA Group as a single entity. *See* Final Results at 53,300–301. Therefore, in calculating the costs for computing CV, Commerce applied a consolidated rate of general and administrative ("G&A") expenses for the entire group, which was the average of each farm's separate G&A expense. *See id.* at 53,301.

Asocolflores argues that Commerce's G&A expense methodology for the HOSA Group "is unlawful under the second prong of the *Chevron* standard because it fails to fulfill the statutory purpose of calculating dumping margins using the most accurate information available." Asocolflores Br. at 53. According to Asocolflores, because Innovacion was the only HOSA Group farm to purchase flowers for bouquet operations, and because its G&A expense rate was significantly lower than those of the other HOSA Group farms, Commerce should have used Innovacion Andina's separate G&A expense rate, rather than applying the HOSA Group average. *See id.* at 52–53.

Commerce argues that its use of a single, average G&A expense rate for the HOSA Group is consistent with the agency's collapsing and G&A expense allocation practices, both of which have been sustained by this Court.

Adhering to its collapsing practice, Commerce treated the HOSA Group as one company, since it is composed of several related companies. *See* Def.'s Mem. in Partial Opp'n to Def.-Intervenors' Mot. for J. on the Agency R. at 52. This Court has held that Commerce's decision to define "company" to include several closely related companies is a permissible application of the antidumping statute. *See Queen's Flowers de Colombia v. United States*, 21 CIT ___, ___, 981 F. Supp. 617, 622 (1997).[20]

Moreover, in calculating a company's G&A expenses, Commerce finds the ratio of the company's total G&A expenses relative to the total cost of goods sold by the company and applies this ratio to the cost of manufacture of *each* product. *See* Final Results at 53,300. In other words, Commerce treats G&A expenses as "expenses incurred for the operation of the corporation as a whole and not directly related to the manufacture of a particular product." *Id.* This Court has recognized

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[20] Although the *Queen's Flowers* decision involved pre-URAA law, the amended provision does not mandate a different conclusion.

that G&A expenses relate to the activities of a company *as a whole*. *See U.S. Steel Group*, 22 CIT at ___, 998 F. Supp. at 1154.[21]

Therefore, Commerce's calculation of a single G&A expense rate for the HOSA Group is consistent with the agency's affirmed practices of treating related companies as a single entity and calculating the G&A expenses for a company as a whole. Moreover, Commerce's calculation of the HOSA Group G&A expense rate is consistent with the objective of promoting accuracy in the determination of dumping margins. Commerce explained that it does "not allow companies to pick and choose which G&A expenses and which divisions of the company will be used in accounting for this expense." Final Results at 53,301. If Commerce treated Innovacion Andina's bouquet operation G&A expenses as distinct from the rest of the HOSA Group's G&A expenses, it would improperly overstate the HOSA Group's G&A expense rate. Therefore, Commerce's calculation of a consolidated G&A expense rate for the entire HOSA Group is a reasonable application of the statute. The Court sustains Commerce's practice.

CONCLUSION

This case having been duly submitted for decision and the Court, after due deliberation, having rendered a decision herein; now in conformity with said decision it is hereby

ORDERED that the Department of Commerce's final determination in *Certain Fresh Cut Flowers From Colombia*, 62 Fed. Reg. 53,287 (Dep't Commerce, Oct. 14, 1997) is sustained in part and remanded in part; and it is further

ORDERED that the issue of Commerce's instruction to respondents not to offset expenses with interest income in calculating indirect selling expenses is remanded for reconsideration and to allow respondents to submit information concerning the interest income offset and for Commerce to make adjustments to constructed export price, as appropriate, based upon this information; and it is further

ORDERED that the issue of Commerce's rejection of the constructed value "profit cap" in calculating constructed value is remanded for Commerce to apply 19 U.S.C. § 1677b(e)(2)(B)(iii) in a manner consistent with this Court's opinion; and it is further

ORDERED that the issue of Commerce's decision to deduct imputed credit expenses from U.S. price but not from constructed value is remanded for Commerce to reconsider and to provide a more detailed explanation of whether it accounted for differences in credit expenses as a circumstance of sale and of its treatment of credit expenses to U.S. and third markets for the purpose of constructed value; and it is further

ORDERED that the issue of Commerce's decision to exclude antidumping surcharges paid to unrelated consignees from constructed export

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[21] Although the *U.S. Steel* decision involved the pre-URAA law, the amended provision does not mandate a different conclusion because the definition of G&A expenses has not changed.

price is remanded for a determination consistent with this Court's opinion; and it is further

ORDERED that the issue of Commerce's decision not to employ the Colombian net monetary correction in calculating constructed value is remanded for Commerce to either apply the net monetary correction to the respondents' financing costs or to explain how the adjustment distorts such costs unless Commerce can demonstrate that the respondents' financing expenses do not relate to the production and sale of the subject flowers; and it is further

ORDERED that the issue of Commerce's decision not to include U.S. credit expenses in "total expenses" is remanded for reconsideration; and it is further

ORDERED that the issue of Commerce's decision not to calculate "total actual profit" net of credit expense is remanded for reconsideration and for Commerce to explain its treatment of credit expenses in calculating "total actual profit;" and it is further

ORDERED that remand results are due on Monday, March 29, 1999; comments and responses thereto are due on Wednesday, April 28, 1999; any rebuttal comments are due on Thursday, May 13, 1999; and it is further

ORDERED that Commerce's final determination is sustained in all other respects.

(Slip Op. 99–11)

FUJITSU LTD. AND FUJITSU AMERICA, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND CRAY RESEARCH, INC., DEFENDANT-INTERVENOR

Court No. 97–11–02021

[Final determination on domestic like product and standing affirmed.]

(Decided January 27, 1999)

Akin, Gump, Strauss, Hauer & Feld, L.L.P. (Warren E. Connelly and *James E. Mendenhall)* for Plaintiffs.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, Department of Justice *(Lucius B. Lau), Patrick V. Gallagher, Jr.*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Counsel, for Defendant.

Wilmer, Cutler & Pickering (John D. Greenwald, Ronald I. Meltzer, Amber Cottle, and *Juan Millan* for Defendant-Intervenor.

OPINION

POGUE, *Judge:* Plaintiffs, Fujitsu Limited and Fujitsu America, Inc. ("Fujitsu") move for judgment on the agency record pursuant to U.S. CIT Rule 56.2 challenging the United States Department of Commerce's ("Commerce") "domestic like product" determination and Commerce's decision not to initiate a standing inquiry in its investigation of vector supercomputers from Japan. *See Initiation of Antidump-*

ing Duty Investigation: Vector Supercomputers from Japan, 61 Fed. Reg. 43,527 (Dep't. Commerce Aug. 23, 1996)("Initiation Notice"). Plaintiffs contend that Commerce's domestic like product determination was erroneous, and therefore, its finding of domestic industry support for an antidumping investigation was fatally flawed.

BACKGROUND

On July 29, 1996, domestic producer Cray Research, Inc. ("Cray") petitioned Commerce to investigate sales at less than fair value of vector supercomputers, defined as "any computer with a *vector* hardware unit as an integral part of any of its central processing unit boards" from Japan. Antidumping Petition from Cray Research, Inc., P.R. Doc. 1 at 8 (Jul. 29, 1996)("Petition") (emphasis provided). Alleging differences between vector and non-vector supercomputers in their performance, architecture, production, and application, Cray limited the scope of its petition to vector supercomputers. *See id.* at 8–15. Cray also defined the "domestic like product" as vector supercomputers. *See id.* at 15.

Fujitsu challenged the petition, arguing that the domestic like product of the investigation must include numerous other supercomputers that are "like, or in the absence of like, most similar in characteristics and uses" to vector supercomputers. *See* August 14, 1996 Letter from Fujitsu, P.R. Doc. No. 9 at 1 (citing 19 U.S.C. §1677(10)(1994)). Fujitsu claimed that vector and non-vector supercomputers compete directly and share the same channels of distribution and end use. *See id.* at 5–18. In addition, Fujitsu maintained that customers perceive vector and non-vector supercomputers as interchangeable, and that both vector and non-vector supercomputers are similar in price and have common manufacturing facilities. *See id.* at 18–23. Accordingly, Fujitsu asked Commerce to poll the domestic producers of both vector and non-vector supercomputers in determining whether industry support exists for the investigation pursuant to 19 U.S.C. § 1673a(c)(1)(B) & (c)(4)(D). *See id.* at 24–25. Cray submitted rebuttal comments to Fujitsu's arguments on August 16, 1996, *see* August 16, 1996 Letter from Cray, P.R. Doc. No. 10, and Fujitsu responded with a second submission on August 19, 1996. *See* August 19, 1996 Letter from Fujitsu, P.R. Doc. No. 12.

Commerce gave notice of the initiation of its investigation on August 23, 1996, defining the scope to include "all vector supercomputers[.] * * * A vector supercomputer is any computer with a vector hardware unit as an integral part of its central processing unit ['CPU'] boards." Initiation Notice at 43,528. The scope definition in the Initiation Notice was based on the petition. *See id.* Commerce concluded that the vector unit in the CPU "identifies both the Japanese vector supercomputers that the petitioner would have subject to the antidumping investigation and the domestically-produced products that would define the domestic industry." *Id.* at 43,528–529.

Having decided to define the domestic like product as vector supercomputers, Commerce addressed Fujitsu's argument, explaining:

> When properly analyzed, the evidence of record demonstrates that there are clear dividing lines between the characteristics and uses of the vector supercomputers subject to investigation and the various other types of supercomputers. Significantly, the vector supercomputer has a different computer architecture than the non-vector computer technologies and, consequently, it processes information differently. The close physical proximity of the vector hardware to the computer's central processing boards and high memory bandwidth (with limited parallelism) contribute to the high speeds with which vector supercomputers process information. These differences give vector supercomputers different performance characteristics than non-vector supercomputers. For example, vector supercomputers are more efficient dealing with linear and matrix algebra equations than are non-vector supercomputers. Given the states of the different supercomputer technologies today, there are computer modeling applications where only the vector supercomputers are used. For example, only vector supercomputer bids met the technical requirements (which involved weather forecasting and climate modeling applications) in the University Corporation for Atmospheric Research ("UCAR") procurement from which this petition derives the export price.

Id. at 43,529.

Defining the domestic like product as vector supercomputers, Commerce determined that there was industry support for the petition because the petitioner, the only domestic producer of vector supercomputers, accounted for more than fifty percent of the total domestic production of vector supercomputers. *See id.* Thus, Commerce proceeded with its investigation, ultimately determining that Japanese vector supercomputers were being sold in the United States at less than fair value. *See Notice of Final Determination of Sales at Less Than Fair Value: Vector Supercomputers From Japan*, 62 Fed. Reg. 45,623–624 (Dep't Commerce Aug. 28, 1997).

STANDARD OF REVIEW

In reviewing a final determination, the Court must decide whether Commerce's determination is in accordance with law and whether Commerce's conclusions are supported by substantial evidence on the record. Section 516A(b)(1)(B)(i) of the Tariff Act of 1930, *as amended*; 19 U.S.C. § 1516a(b)(1)(B)(i)(1994).

DISCUSSION

I. Scope and Industry Support

An antidumping investigation may be commenced in one of two ways: 1) Commerce may self-initiate an investigation, *see* 19 U.S.C. § 1673a(a); 19 C.F.R. § 353.11 (1996); or 2) an interested party may file a petition alleging the elements necessary for imposition of an antidumping duty.

See 19 U.S.C. § 1673a(b); 19 C.F.R. § 353.12 (1996). To initiate an investigation in response to a petition, Commerce must "determine whether the petition alleges the elements necessary for the imposition of a duty" and "determine if the petition has been filed by or on behalf of the industry[,]" i.e., whether the domestic industry supports the investigation. 19 U.S.C. § 1673a(c)(1)(A).

Before the Uruguay Round Agreements Act ("URAA") took effect, Commerce could presume industry support unless a petition was actively opposed. *See, e.g., NTN Bearing Corp. v. United States*, 15 CIT 75, 79, 757 F. Supp. 1426, 1429 (1991), *aff'd*, 972 F.2d 1355 (Fed. Cir. 1992). Now, Commerce may not operate on the basis of the presumption, but rather must establish that:

> (i) the domestic producers or workers who support the petition account for at least 25 percent of the total production of the *domestic like product*, and
>
> (ii) the domestic producers or workers who support the petition account for more than 50 percent of the production of the *domestic like product* produced by that portion of the *industry* expressing support for or opposition to the petition.

19 U.S.C. §1673a(c)(4)(A)(emphasis provided). This determination must be concluded within twenty days of the filing of the petition.[1] 19 U.S.C. § 1673a(c)(1)(A).

Nineteen U.S.C. § 1677(4)(A) defines "industry" as the "producers as a whole of a domestic like product[.]" Therefore, based on the language of 19 U.S.C. § 1673a(c)(4)(A), Commerce must define the domestic like product in order to determine whether the industry making the products included in the scope of the Petition support the initiation of an investigation.

II. Commerce's Domestic Like Product Determination

Commerce based its initial definition of domestic like product on Cray's petition, according to its usual practice. *See* Initiation Notice at 43,528. Commerce explained,

> [Nineteen U.S.C. § 1677(10)] defines domestic like product as "a product that is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this title." Thus, the reference point from which the like product analysis begins is "the article subject to an investigation," *i.e.*, the class or kind of merchandise to be investigated, which normally will be the scope as defined in the petition.

Id. See also Kern-Liebers USA, Inc. v. United States, 19 CIT 393, 396, 881 F. Supp. 618, 621 (1995)("[T]he agency generally exercises [its] 'broad discretion to define and clarify the scope of an antidumping investigation in a manner which reflects the intent of the petition.'")

[1] The URAA also provides that "[a]fter [Commerce] makes a determination with respect to initiating an investigation, the determination regarding industry support shall not be reconsidered." 19 U.S.C. § 1673a(c)(4)(E). Prior to the URAA, parties could challenge Commerce's industry support determination late in the investigation. *See Tianjin Mach. Import & Export Corp. v. United States*, 16 CIT 931, 944, 806 F. Supp. 1008, 1021 (1992).

(quoting *Minebea Co., Ltd. v. United States*, 16 CIT 20, 22, 782 F. Supp. 117, 120 (1992), *aff'd on other grounds*, 984 F.2d 1178 (Fed. Cir. 1993)). Commerce determined that "there are clear dividing lines between the *characteristics* and *uses* of the vector supercomputers subject to investigation and the various other types of supercomputers." Initiation Notice at 43,529 (emphasis added). Therefore, Commerce concluded that the domestic like product is limited to vector supercomputers.[2] *See id.* Commerce based its standing determination on this definition. *See id.*

Plaintiffs argue that Commerce's determination is not supported by substantial evidence. *See* Pl.'s Mem. in Supp. of Mot. J. on the Agency R. at 22. Plaintiffs claim that "[t]he domestic like product * * * must be defined based on the entire range of characteristics and uses of the imported product, not just those which Cray identified in its petition." *Id.* at 24.

Plaintiffs maintain that Commerce traditionally uses the International Trade Commission ("Commission") test to define the domestic like product. *See id.* at 23 (citing *High Information Content Flat Panel Displays and Display Glass Therefor from Japan*, 56 Fed. Reg. 32,376, 32,381 (Dep't Commerce July 16, 1991)(final determination); *Certain Textile Mill Products and Apparel From Sri Lanka; Cotton Inspectors' Gloves*, 50 Fed. Reg. 9,826, 9,827 (Dep't Commerce Mar. 12, 1985)(final countervailing duty determination).[3] Factors that the Commission typically considers in defining domestic like product include (1) physical characteristics and uses, (2) interchangeability of products, (3) channels of distribution, (4) customer and producer perceptions of the products, (5) the use of common manufacturing facilities and personnel, and (6) price. *See id.* at n.42. Plaintiffs ask this Court to utilize an adverse inference to establish that the Commission factors not discussed by Commerce would not support its like product determination. *See id.* at 23–24. Using the "entire range" of the Commission factors, Plaintiffs claim, the like product would include non-vector supercomputers. *See id.* at 24.

The Court finds that even if it accepts the Plaintiffs' argument, there is substantial evidence in the record to support Commerce's finding.[4] When examining Commerce's factual determinations, the Court must determine whether the record as a whole contains "such relevant evi-

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[2] Having identified the domestic like product, Commerce did not have to extend its investigation to identify a product "most similar in characteristics and uses" to vector supercomputers. *See* 19 U.S.C. § 1677(10).

[3] Although these are pre-URAA determinations, the "domestic like product" definition has not been altered as a result of the URAA. Therefore, the URAA does not mandate a change in Commerce's defining of the domestic like product.

[4] Moreover, the Court notes that in reviewing the Commission's like product findings for the purpose of investigating injury to the domestic industry, it is not the province of the courts to change the priority of the relevant like product factors or to reweigh or judge the credibility of conflicting evidence. *See Iwatsu Elec. Co. v. United States*, 15 CIT 44, 47, 758 F. Supp. 1506, 1509 (1991). "It is within the Commission's discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor or piece of evidence." *Maine Potato Council v. United States*, 9 CIT 293, 300, 613 F. Supp. 1237, 1244 (1985). Therefore, by analogy, for the purpose of standing, it is within Commerce's discretion to weigh the priority of the relevant like product factors and determine each factor's significance. *Cf. NTN Bearing Corp.*, 15 CIT at 80, 757 F. Supp. at 1430. Here, Commerce appropriately focused its inquiry on characteristics and uses because the statute defines domestic like product as a product that is like or "most similar in characteristics and uses with" the subject merchandise. *See* Def.'s Mem. in Opp'n to Pl.'s Mot. for J. on the Agency R. at 31 (citing 19 U.S.C. §1677(10)).

dence as a reasonable mind might accept as adequate to support [Commerce's] conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)(quoted in *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984)). For the purposes of Commerce's like product inquiry, the record consisted of Cray's petition, Fujitsu's two August submissions, which included over 450 pages of articles analyzing supercomputer systems, and Cray's rebuttal comments.[5]

A. Characteristics

1. Physical Characteristics

With regard to physical characteristics, Commerce noted that vector supercomputers have a different computer architecture than non-vector supercomputers. *See* Initiation Notice at 43,529. Substantial evidence supports this conclusion.

First, the Court notes that Fujitsu does not dispute that vector hardware being integral to any of the computer's CPU boards is a characteristic limited to vector supercomputers. *See* Pl.'s Mem. in Supp. of Mot. J. on the Agency R. at 27. In its Initiation Notice, Commerce indicated that this was the key characteristic identifying the domestic like product. *See* Initiation Notice at 43,528–529.

Second, numerous reports included in Plaintiffs' August 14, 1996 submission characterized vector supercomputer architecture as particular to vector supercomputers. The Smaby Group report, for example, not only characterized vector supercomputer architecture as distinct, but listed Cray as its only domestic producer: "The parallel/vector[6] architecture is the most popular for high-end scientific computing. * * * Machines in this class are today manufactured by Cray Research (the overwhelmingly dominant vendor), Fujitsu, NEC, Hitachi, and Cray Computer." August 14, 1996 Letter from Fujitsu, P.R. Doc. 9, Exhibit 7 (Smaby Group, GLOBAL COMPETITIVENESS OF JAPANESE SUPERCOMPUTERS at 8).

The International Data Corporation ("IDC") report stated, "We expect the classical vector market to remain the central computational platform throughout the rest of the decade, but with decreasing demand outside of the installed base." *Id.*, Exhibit 10 (IDC, HIGH PERFORMANCE SYSTEMS: 1995–1999 FORECAST SUMMARY at 5). Finally, Larry Smarr, Director of the National Center for Supercomputing Applications ("NCSA") testified before the House Science Committee Basic Research Subcommittee that, "NCSA has worked with users to develop and mi-

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[5] The Plaintiffs assert that Commerce failed to consider their arguments or adequately review the voluminous documentary evidence they submitted. *See* Pl.'s Mem. in Supp. of Mot. J. on the Agency R. at 3, 21–22. Plaintiffs' argument is unfounded, however, because Commerce summarized Plaintiffs' arguments in its Initiation Notice. *See* Initiation Notice at 43,528. Moreover, absent some showing to the contrary, Commerce is entitled to the presumption that it considered the record evidence as a whole. *Cf. Nat'l Ass'n of Mirror Mfrs. v. United States*, 12 CIT 771, 779, 696 F. Supp. 642, 648 (1988)(holding that "the Commission is presumed to have considered all of the evidence in the record.").

[6] Smaby Group defined "parallel/vector" architecture as a design combining several processors in a single system, but including vector processors as an integral component. *See* August 14, 1996 Letter from Fujitsu, P.R. Doc. no. 9, Exhibit 7 (Smaby Group, GLOBAL COMPETITIVENESS OF JAPANESE SUPERCOMPUTERS at 2). Therefore, parallel/vector architecture falls within Commerce's definition of vector supercomputers, i.e., a "computer with a vector hardware unit as an integral part of its central processing unit boards." Initiation Notice at 43,528.

grate application codes through three distinct phases of supercomputer architectures: shared memory vector processors; massively parallel processors; and scalable memory RISC processors." *Id.*, Exhibit 3 *(Hearings Regarding the National Science Foundation Before the Subcommittee on Basic Research of the House Committee on Science* (Mar. 19, 1996)(statement of Larry L. Smarr, Director of NCSA at 2).

2. Performance Characteristics

The record also contains substantial evidence supporting Commerce's finding that vector supercomputers possess different performance characteristics than non-vector supercomputers. *See* Initiation Notice at 43,529. Again, numerous articles attached to Plaintiff's August 14, 1996 submission characterized vector supercomputers as having different performance characteristics, including the following passage from the Smaby Group report:

> For the last twenty years, enterprise-level supercomputers from all manufacturers have employed vector processing to achieve very high calculation rates. A conventional, or "scalar," processor gains speed by reducing the time it takes to complete each instruction in series. The vector processor (or pipeline) benefits from the predictability of array operations. Memory accesses and individual calculation steps are overlapped for each element in the array, allowing each successive calculation to be initiated very rapidly. This results in much higher aggregate processing rates for applications which make effective use of vectors.

August 14, 1996 Letter from Fujitsu, P.R. Doc No. 9, Exhibit 7 (Smaby Group, GLOBAL COMPETITIVENESS OF JAPANESE SUPERCOMPUTERS at 2).

Bill Buzbee, the director of NCAR's Scientific Computing Division, compared the processing speeds of massively parallel processors ("MPPs") and vector supercomputers as follows: "To overcome the software disadvantage [of MPP systems], a 1,000-node MPP machine would have to work at 40 GFLOPS [(billion floating point operations per second)] four to eight times faster than currently to make it as attractive as a 20-GFLOPS shared-memory [vector] supercomputer of comparable price[.]" *Id.*, Exhibit 12 (Gary H. Anthes, *Research Lab Sizes Up Slew of Supercomputers*, COMPUTERWORLD, Aug. 1, 1994).

Finally, a September 8, 1995 excerpt from *Science* distinguished vector processing from non-vector computer processing as follows: "the vector computer derives its power from expensive, custom-built processors that perform calculations simultaneously on long strings of numbers—vectors—instead of adding, subtracting, multiplying, and dividing numbers two at a time." *Id.*, at Exhibit 12 (Robert Pool, *Off-the-Shelf Chips Conquer the Heights of Computing*, SCIENCE, Sept. 8, 1995).

B. Uses

Finally, the record contains substantial evidence supporting Commerce's conclusion that certain applications are chiefly performed by vector supercomputers. *See* Initiation Notice at 43,529. Numerous articles attached to Plaintiffs' submissions to Commerce corroborate

Commerce's finding. Although many of Plaintiffs' articles do indicate that vector supercomputers face increasing competition from non-vector supercomputers, they also demonstrate that certain applications still demand vector supercomputers alone.

For example, while noting the increasing competition vector supercomputers face from parallel processing computers, a January 1996 article from BYTE cautioned,

> But don't abandon vector processing just yet. *In certain situations*, a vector-processing system delivers better performance than a parallel-processing system, especially when dealing with complex simulations involving huge data arrays. That's because the average memory-access times can be shorter with vector processing, even with a large memory space. In contrast, a parallel-processing system with lots of memory might have to wait quite a while for data to move from one part of the system to another[.]

August 14, 1996 Letter from Fujitsu, P.R. Doc. 9, Exhibit 12 (Tom Thompson, *The World's Fastest Computers*, BYTE, January 1996).

Moreover, in Fujitsu's August 19, 1996 letter, the Plaintiffs note Cray's intention to create a hybrid computer (incorporating each of the three main architectures—MPP, symmetric multiprocessors ("SMP"), and vector) as indication that there were not clear dividing lines between the three. *See* August 19, 1996 Letter from Fujitsu, P.R. Doc. No. 12, at 4. To the contrary, Robert Ewald, president of Cray, explained that the company intended to create a hybrid supercomputer based on their recognition that each architecture performs certain applications better than the others. *See* August 14, Letter from Fujitsu, P.R. Doc. No. 9, Exhibit 12 (Richard McCormack, *Cray Research to Merge Vector, SMP and MPP into One Architecture*, HIGH PERFORMANCE COMPUTING AND COMMUNICATIONS WEEK, Feb. 9, 1995). In the article, Ewald explained,

> We have all three [architectures] because of our belief that different applications would run best on all three and we always believed it would be a transitory thing. * * * In concept, if you looked at the parallel world today as it exists, there are some large problems that really will parallelize well. There are some that run best in the vector world and there are smaller applications that run best in the SMP world.

Id.

Finally, only bids that included vector supercomputers met the technical requirements for weather modeling in the UCAR procurement from which Commerce derived the export price. *See* Initiation Notice at

43,529; *see also* Petition at Annex A (May 20, 1996 UCAR Press Release).[7]

C. Other Considerations

Naturally, the process of determining whether one product is "like" another entails some line drawing. For purposes of standing, Congress afforded Commerce the discretion to draw the line. *See* 19 U.S.C. § 1673a(c)(1)(A)(ii); *see also NTN Bearing Corp.*, 15 CIT at 80, 757 F. Supp. at 1430 ("It is the function of [Commerce] to determine standing[.]").[8] Where, as here, Commerce's determination is supported by substantial evidence, the Court will affirm.

Moreover, the Court notes the limited time frame within which Commerce must make its determination. As noted, the statute requires that Commerce determine whether "the petition has been filed by or on behalf of the industry" within twenty days of its filing. *See* 19 U.S.C. § 1673a(c)(1)(A). The Statement of Administrative Action also indicates Congress's intention under the URAA to "streamline" the process of determining industry support for a petition to resolve the matter "conclusively at the outset of a proceeding[.]" *See* Statement of Administrative Action, H.R. Doc. No. 103–316, 103d Cong., 2d Sess. (1994) at 861–62.[9] Therefore, in reviewing the standing determination, the Court is mindful of Commerce's statutory mandate to make an expedited finding. *See Matson Navigation Co., Inc. v. Federal Maritime Comm'n*, 959 F.2d 1039, 1043 (D.C. Cir. 1992)(holding that, because Congress "mandated strict time limits on the [Federal Maritime] Commission's decisionmaking process for general rate increases[,]" the agency was entitled "to an extra portion of deference in the review of its rate orders."); *cf. Mitsubishi Heavy Industries, Ltd. v. United States*, 21 CIT ___, ___, 986 F. Supp. 1428, 1432 (1997)("Given the time limits imposed on Commerce's initiation decision * * *, the Court finds that the procedures Commerce followed constituted a reasonable application of the statute and therefore, that the scope definition upon which it based its industry support determination was in accordance with law.").

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[7] Plaintiffs claim that "Cray purposefully failed to inform [Commerce] that [Cray's] initial and final bids to UCAR included both vector *and non-vector* machines[,]" and asked the Court to take judicial notice of this fact. Pl.'s Mem. in Supp. of Mot. J. on the Agency R. at 19–20. That Cray may have included both vector and non-vector supercomputers in its bid, however, is not material. First, vector supercomputers are typically designed to include scalar processors to enable them to handle computations with non-vectorized data. *See* August 14, 1996 Letter from Fujitsu, P.R. Doc. No. 9, Exhibit 7 (Smaby Group, GLOBAL COMPETITIVENESS OF JAPANESE SUPERCOMPUTERS at 2). Moreover, what is material is that, although UCAR considered both vector and non-vector supercomputers, the only three bids UCAR deemed competitive featured vector systems. *See* Pl.'s Mem. in Supp. of Mot. J. on the Agency R., Exhibit A (*In the Matter of Vector Supercomputers from Japan*, hearing before the International Trade Commission, Inv. No. 731–TA–750(F), Aug. 27, 1997).

[8] Although *NTN Bearing* was decided before the enactment of the URAA, the statutory definition of "domestic like product" has not changed. Therefore, the decision still has precedential value.

[9] The Statement of Administrative Action represents "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements * * *." H.R. Doc. No. 103–316, 103d Cong., 2d Sess. at 656 (1994). "[I]t is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement." *Id.* (quoted in *Delverde, SrL v. United States*, 21 CIT ___, ___, 989 F. Supp. 218, 229–30 n.18 (1997)).

Here, Cray filed its petition on July 29, 1996. *See* Initiation Notice at 43,528. The SAA provides that where,

> [A] petition provides sufficient evidence that domestic producers or workers accounting for more than fifty percent of total domestic production of the domestic like product expressly support the petition, Commerce will determine, on the basis of evidence contained in the petition, that the petition is filed 'by or on behalf of the domestic industry.'

SAA at 862. Therefore, Congress specifically gave Commerce the authority to make its standing determination on the basis of the evidence contained in the petition alone. Interested parties, however, may submit comments on the issue of industry support pursuant to 19 U.S.C. § 1673a(c)(4)(E). Here, Plaintiffs submitted their initial comments on August 16, 1996—sixteen days after the filing date—and additional comments on August 19, 1996—twenty-one days after the filing date. *See* Initiation Notice at 43,528.

The Court recognizes that the "strict time frames within which to work may require an agency to make its decision on a record more slender than desired and may render acceptable an unusually terse explanation of reasoning." *Matson Navigation*, 959 F.2d at 1043. Here, Commerce had the full twenty days to review the petition and was able to determine that the petition demonstrated sufficient industry support on its face. Commerce then had a mere four days, at most, to review Plaintiffs' comments, yet Commerce did consider them, finding that they were insufficient to warrant a different conclusion. *See* Initiation Notice at 43,528–529.

That Fujitsu "can point to evidence of record which detracts from * * * [Commerce's] decision and can hypothesize a reasonable basis for a contrary determination is neither surprising nor persuasive."[10] *Matsushita Elec. Indus. Co. v. United States*, 3 Fed. Cir. (T) 44, 54, 750 F.2d 927, 936 (1984). The Court must determine whether the record contains "such relevant evidence as a reasonable mind might accept as adequate to support [Commerce's] conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). The possibility of drawing two inconsistent conclusions from the evidence does not prevent [Commerce's] finding from being supported by substantial evidence. *See Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966)(citations omitted); *see also Shieldalloy Metallurgical Corp. v. United States*, 21 CIT ____, ____, 975 F. Supp. 361, 364 (1997)("It is not the Court's role * * * to reweigh the evidence; rather the Court insures that Commerce's determinations are supported by substantial evidence.").

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[10] We emphasize that Fujitsu, the respondent to the underlying investigation, alone has expressed opposition to the petition. The Court notes that not a single domestic producer of supercomputers has expressed opposition to the petition. *Cf. Mitsubishi*, 21 CIT at ____, 986 F. Supp. at 1432.

CONCLUSION

Commerce's domestic like product determination is supported by substantial evidence and is in accordance with law. Therefore, Commerce's determination of industry support for the petition is sustained, and this case is dismissed. Judgment will be entered accordingly.

(Slip. Op. 99–12)

MICRON TECHNOLOGY, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND LG SEMICON CO., LTD., AND LG SEMICON AMERICA, INC., DEFENDANT-INTERVENORS

Court No. 96–06–01529

[Final Results in the first administrative review of an antidumping duty order of the U.S. Department of Commerce is sustained in part, and remanded in part.]

(Dated January 28, 1999)

Hale & Dorr, LLP (Gilbert B. Kaplan, Michael D. Esch, Paul W. Jameson, Cris R. Revaz, and *John M. Ryan),* for plaintiff Micron Technology, Inc.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Cynthia B. Schultz);* Office of the Chief Counsel for Import Administration, United States Department of Commerce *(Patrick V. Gallagher, Jr.),* of counsel, for defendant.

Kaye, Scholer, Fierman, Hays & Handler, LLP (Michael P. House and *Raymond Paretzky),* for defendant-intervenors LG Semicon Co., and LG Semicon America, Inc.

OPINION

GOLDBERG, *Judge:* In this action, the Court reviews certain aspects of the Department of Commerce's ("Commerce") *Notice of Final Results of Antidumping Administrative Review: Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea*, 61 Fed. Reg. 20216 (May 6, 1996) *("Final Results").* More specifically, plaintiff, Micron Technology, Inc. ("Micron"), petitioner in the underlying administrative review, contests five aspects of the *Final Results*.

The Court exercises jurisdiction to review this motion for judgment on the agency record pursuant to 28 U.S.C. § 1581(c) (1994). The Court sustains the *Final Results* in part, and remands in part.

I.

BACKGROUND

Micron, a U.S. manufacturer of dynamic random access memory semiconductors ("DRAMS"), filed a petition with Commerce in April 1992, alleging that Korean producers of DRAMS were selling subject merchandise in the United States at less than fair value. Following an

antidumping investigation, Commerce published an antidumping order on DRAMS from Korea in May 1993. *See* 58 Fed. Reg. 27520 (May 10, 1993).

In the first anniversary month of the order, three Korean respondents, including LG Semicon Co., Ltd. and LG Semicon America, Inc. (collectively "LG Semicon"), and Micron requested an administrative review of the DRAMS order.[1] On June 15, 1994, Commerce initiated a review of the three Korean manufacturers, covering the period October 29, 1992 through April 30, 1994. *See Notice of Initiation of Antidumping Administrative Review*, 59 Fed. Reg. 30770, 30771 (1994). In the *Final Results* of the review, Commerce assigned a dumping margin of 0.00% to LG Semicon. *See* 61 Fed. Reg. at 20222.

Micron objects to five aspects of Commerce's *Final Results* as they pertain to LG Semicon. It asserts that Commerce erred (1) when it calculated LG Semicon's research and development ("R&D") costs; (2) in its treatment of LG Semicon's royalty payments; (3) when it decided to allocate certain indirect selling expenses reported by LG Semicon; (4) in its treatment of LG Semicon's reported loan fees; and (5) in its treatment of LG Semicon's U.S. trading company. Commerce agrees with Micron only insofar as it requests that the first issue, the calculation of R&D expenses, should be remanded for further review. Commerce opposes the remaining challenges to the *Final Results*. LG Semicon opposes all challenges.

II.

STANDARD OF REVIEW

Commerce's determination will be sustained if it is supported by substantial evidence on the record and is otherwise in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B) (1994).

To determine whether Commerce's interpretation of the statute is in accordance with law, the court applies the two-prong test set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron* first directs the court "to determine whether Congress has directly spoken to the precise question at issue." *Id.* at 842–43 (internal quotations and citations omitted). In doing so, the court must inquire "whether Congress's purpose and intent on the question at issue is judicially ascertainable." *Timex V.I., Inc. v. United States*, ____ Fed. Cir. (T) ____, ____, 157 F.3d 879, 881 (1998) (citing *Chevron*, 467 U.S. at 842–43 & n.9). Congress's purpose and intent must be divined using the traditional tools of statutory construction. *Id.* at 882 (citation omitted). Of course, the "first and foremost tool to be used is the statute's text," and "if the text answers the question, that is the end of the matter." *Id.* (citations and internal quotation omitted). In addition to the plain language of the statute, the other tools include, the

[1] The underlying administrative review was conducted prior to January 1, 1995. Consequently, the applicable law in this case is the antidumping statute as it existed prior to the amendments made by the Uruguay Round Agreements Act, Pub. L. No. 103–465, 108 Stat. 4809 (1994). *See Torrington Co. v. United States*, ___ Fed. Cir. (T) ___, ___, 68 F.3d 1347, 1352 (1995).

statute's structure, canons of statutory interpretation, and legislative history. *See id.* (citing *Dunn v. Commodity Futures Trading Comm'n*, 117 S.Ct. 913, 916–20 (1997); *Chevron*, 467 U.S. at 859–63; *Oshkosh Truck Corp. v. United States*, 123 F.3d 1477, 1481 (Fed. Cir. 1997)). If, using these tools, Congress's intent is unambiguous as to the issue at hand, then the court must give effect to the intent of Congress.

On the other hand, if Congress's intent is "silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843 (footnote omitted). Thus, the second prong of the *Chevron* test directs the court to consider the reasonableness of an agency's interpretation.

If asked to review Commerce's factual findings, the court will uphold the agency if its findings are supported by substantial evidence. "Substantial evidence is something more than a 'mere scintilla,' and must be enough reasonably to support a conclusion." *Ceramica Regiomenta, S.A. v. United States*, 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986) (citations omitted), *aff'd*, 5 Fed. Cir. (T) 77, 810 F.2d 1137 (1987). In applying this standard, the court affirms Commerce's factual determinations so long as they are reasonable and supported by the record as a whole, even if there is some evidence that detracts from the agency's conclusions. *See Atlantic Sugar, Ltd. v. United States*, 2 Fed. Cir. (T) 130, 744 F.2d 1556, 1563 (1984).

III.

Discussion

A. *Calculation of R&D Expenses*

Micron first argues that Commerce's calculation of LG Semicon's research and development ("R&D") expenses is incorrect. Micron points in particular to Commerce's statement that it "relied on LGS's accounting system to determine the total R&D figure applicable to the analysis: it amortized any R&D expenses that LGS amortized in its own books and records and it expensed any R&D expenses that LGS expensed." *Final Results*, 61 Fed. Reg. at 20219. Micron contends that Commerce acted contrary to this statement in the *Final Results*: it correctly included R&D expenses from LG Semicon's financial statements that were incurred in 1993, yet erroneously failed to include other R&D expenses that were also expensed in 1993, though incurred and amortized prior to 1993. Micron asserts that the nature of this error is clerical. Therefore, Micron requests that the Court remand to Commerce with instructions to include in its R&D calculation *all* costs expensed in 1993, regardless of whether the R&D expenses were actually incurred in 1993.

Commerce agrees that a remand is appropriate on this issue. More specifically, Commerce requests that the Court remand "to reconsider its calculation of LG Semicon's R&D costs incurred in 1993 in light of

this Court's remand to Commerce in the LTFV investigation,[2] ordering Commerce to amortize LG Semicon's R&D expenses, rather than expense them in its calculation." *See* Def.'s Br. In Opp. to Mot. for J. on the Agency R., at 2.

The Court first notes that a remand request by Commerce should not dictate the action subsequently taken by the court. *See Gulf States Tube Div. of Quanex Corp. v. United States*, 21 CIT ____, ____, 981 F. Supp. 630, 647 (1997). Nonetheless, the Court deems that a remand is appropriate in this instance, but for reasons other than those articulated by plaintiff and defendant.

As noted above, Micron cites to Commerce's *Final Results* for the proposition that Commerce intended to "amortize[] any R&D expenses that LGS amortized in its own books and records and [] expense[] any R&D expenses that LGS expensed." *Final Results*, 61 Fed. Reg. at 20219. Micron's citation, however, obscures the context of Commerce's statement. As evidenced below, the statement excerpted by Micron falls, not within a discussion of how to calculate *total* R&D expenses, but rather how to calculate a specific type of R&D expense, *purchased* R&D.

> **Comment 6:** LGS asserts that the Department should accept amortization of purchased R&D amounts over the relevant contract period. LGS argues that the Department's decision in the preliminary determination to expense purchased R&D in the year incurred is inconsistent with the CIT decision in the less-than-fair-value investigation. *See Micron I*. LGS asserts that the Micron decision requires the Department to amortize R&D expenses over the life cycle of the product.
>
> The petitioner argues that LGS's own financial statements expensed purchased R&D in the year incurred. Therefore, all payments related to the purchased R&D should be acknowledged in the year in which they were incurred, since this is how the expenses were recorded in the company's books and records.
>
> **DOC Position:** We agree with petitioner that LGS's purchased R&D expenses should be acknowledged in the year in which they were incurred, since this is how the expenses were recorded in the company's books and records. *See* LGS COP/CV Verification Report of July 26, 1995 at page 8. Moreover, the [*Micron I*] decision requires the Department to allow the allocation of R&D expenses over time, when the allocation is made in accordance with generally accepted accounting practices in effect in the home country, and when Commerce is satisfied that those principles reasonably reflect the costs associated with the production of the subject merchandise. In this case, although the Korean GAAP may allow LGS to amortize its purchased R&D over a given period, LGS did not do so. Rather, LGS expensed purchased R&D for its financial statements, and amortized it over a longer period for the antidumping response. In these calculations, the Department relied on LGS's accounting

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[2] The parties appealed various aspects of Commerce's final determination in the less-than-fair-value investigation, including certain R&D issues. *See Micron Technology, Inc. v. United States*, 19 CIT 829, 893 F. Supp. 21 (1995) ("*Micron I*").

> system to determine the total R&D figure applicable to the analysis: it amortized any R&D expenses that LGS amortized in its own books and records and it expensed any R&D expenses that LGS expensed.

Final Results, 61 Fed. Reg. at 20219. Contrary to what Micron would have the Court believe, when placed in context it is not apparent whether Commerce intended the excerpted statement, i.e., the last sentence, to serve as a methodology for calculating *all* R&D expenses, or only *purchased* R&D expenses. That is, it can be inferred that the phrase "[i]n *these* calculations," from the last sentence refers to the calculation of *purchased* R&D expenses, not total R&D expenses, thereby implying that the R&D expenses referred to later in the sentence are also *purchased* R&D expenses.[3]

On the other hand, the Court agrees that the last sentence could also be construed as an attempt to establish Commerce's methodology for calculating all R&D expenses, not just purchased R&D expenses. Because the Court does not presume to opine on which view Commerce actually holds, it is appropriate to remand this issue so that Commerce may clarify the meaning of this last sentence from Comment 6. In doing so, Commerce should clarify the precise methodology it has used to calculate total R&D expenses. This is not a simple remand to correct for a clerical error; because Commerce failed to articulate clearly whether the methodologies used to calculate total R&D expenses as opposed to purchased R&D expenses are the same or different, it must do more than correct for a clerical error.

The Court also cautions that Commerce should ensure that its clarified methodology is non-distortive and that it accurately and reasonably reflects costs. In particular, the Court notes that if Commerce continues to base its total R&D figure on those costs expensed in 1993, it should refrain from including in this figure those R&D costs expensed in 1993, yet incurred prior to 1993. Basing the total R&D figure on costs actually incurred and expensed in 1993 *plus* costs expensed in 1993, yet incurred prior to 1993 conflates the amortizing and expensing methodologies and is plainly distortive. It effectively results in double counting and, as such, should be rejected. *See, e.g.*, *Hussey Copper, Ltd. v. United States*, 17 CIT 993, 999–1000, 834 F. Supp. 413, 420 (1993) (ordering remand to correct for possible double counting of credit expense).

B. *Treatment of Royalty Payments*

Micron contends that Commerce erred when it declined to make a circumstance of sale ("COS") adjustment to account for alleged differences in LG Semicon's royalty payments. Specifically, Micron argues that because different royalties were paid to two customers depending on whether the merchandise was sold in the United States or home market

[3] If this is the case, the existing margin calculation, i.e., where purchased R&D costs are expensed in the year incurred, makes sense. In other words, when Commerce relied on LG Semicon's accounting system to calculate purchased R&D expenses, it effectively excluded the option of amortizing purchased R&D expenses because, as Commerce points out, LG Semicon's records acknowledged its purchased R&D expenses in the year in which they were incurred, not on an amortized basis.

and because the royalties were paid on the basis of sales value, a COS adjustment to U.S. and home market prices should have been made to account for the alleged discrepancy. This claim is without merit.

First, contrary to Micron's argument, the evidence of record plainly establishes that LG Semicon made royalty payments to one of the customers at the same rate in both the United States and Korea. More precisely, LG Semicon produced a royalty agreement for the customer, showing that the royalty rate was the same on both U.S. and Korean sales. *See* LG Semicon's Supplemental Sales Resp. (Oct. 19, 1994), C.R. Doc. 33, at App. SS–13 (providing a royalty agreement that defined "NET SALES BILLED" as DRAM sales "in the United States and Korea" and setting an identical fixed percentage for the royalty rate on the "NET SALES BILLED"). Thus, with respect to one of the two royalties at issue, the Court has reviewed the record evidence in detail and determined there is no factual basis for Micron's argument.[4]

More generally, Commerce's decision to treat the royalty payments as a cost of manufacture, rather than as a selling expense that required a COS adjustment, was in accordance with law. As stated in the *Final Results*, "it has been [Commerce's] longstanding practice to treat royalty payments for production technology as [a] cost of manufacturing, even in circumstances where the royalty payments were based on sales revenue." 61 Fed. Reg. at 20218–19 (citing *Extruded Rubber Thread from Malaysia; Final Determination of Sales at Less Than Fair Value*, 57 Fed. Reg. 38465 (Aug. 25, 1992) *("Rubber Thread"); Certain Hot-Rolled Carbon Steel Flat Products from Canada; Final Determination of Sales at Less Than Fair Value*, 58 Fed. Reg. 37099 (July 9, 1993) *("Canadian Steel")).* In both *Rubber Thread* and *Canadian Steel*, Commerce expressly determined that a royalty fee paid for production technology should be treated as a cost of manufacturing, not as a selling expense.[5] *See* 57 Fed. Reg. at 38479–80; 58 Fed. Reg. at 37118. Similarly here, LG Semicon's royalty obligation was based on the purchase of production technology and, therefore, Commerce treated the expenses as a cost of manufacture. The Court finds Commerce's established practice reasonable, as it is based on sound logic: quite simply, a payment made for production technology more properly corresponds to the cost of manufacturing certain merchandise, than to expenses associated with the sale of the merchandise.

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[4] Micron also argues that Commerce erred when it failed to verify the information contained in the royalty agreement. This argument does not withstand scrutiny. The terms of the royalty agreement provided to Commerce are plain, and there is no suggestion that the agreement itself is bogus. As such, the evidence presented to Commerce amounted to uncontroverted record evidence that the royalty rate for this customer was the same in the United States and Korea. Moreover, it is well established that Commerce has the discretion not to verify each piece of evidence made part of the record. *See, e.g., Monsanto Co. v. United States*, 12 CIT 937, 944, 698 F. Supp. 275, 281 (1988). Commerce certainly acted within its discretion when it decided that limited resources should not be allocated to verify the foundation of a royalty agreement.

[5] Micron counters that there is not an established practice because Commerce declined to treat royalties as a cost of manufacture in a 1988 determination. *See Color Televisions from Korea; Final Results of Administrative Review*, 53 Fed. Reg. 24975 (July 1, 1988) *("Color TVs")*. Yet, as Commerce correctly points out, unlike the case at bar, it was unclear in this earlier determination whether the royalty expenses were for production technology or other obligations. Thus, the lone *Color TVs* determination does not serve to undermine the more recent practice established in *Rubber Thread* and *Canadian Steel*.

Accordingly, Commerce's treatment of the royalty payments at issue was in accordance with law and supported by substantial evidence.

C. *Allocation of Home Market Indirect Selling Expenses*

Typically, Commerce requires indirect selling expenses to be allocated on a sales value basis. *See Carbon Steel Butt-Weld Pipe Fittings from Thailand*, 57 Fed. Reg. 21065, 21067 (May 18, 1992); *Sweaters of Manmade Fibers from Taiwan*, 55 Fed. Reg. 34585, 34596 (Aug. 23, 1990); *see also* Def.'s Br. In Opp. to Mot. for J. on the Agency R., at 17 n.6 (acknowledging that Commerce usually allocates indirect selling expenses on a sales value basis). In this case, LG Semicon identified its home market selling expenses by subdivision of the company's overall sales division, and reported these expenses on a sales value basis. LG Semicon also reported certain "common expenses," which were not broken out by subdivision. For these additional expenses, LG Semicon offered alternative allocation methodologies to account for the indirect selling expenses. Commerce accepted LG Semicon's alternative allocation methodologies. Micron contends that Commerce erred when it allowed LG Semicon to report certain indirect selling expenses using allocation methodologies other than sales value. Micron particularly complains that a respondent should not be allowed to "pick and choose among allocation methodologies." Pl.'s Br. In Supp. of Mot. for J. on Agency R., at 24.

Responding to Micron's challenge on this issue at the administrative level, Commerce stated as follows:

> It is not our policy to require allocation of indirect selling expenses based upon relative sales value in every instance. More specifically, in the final results of the less-than-fair-value investigation we clearly noted that we would accept an allocation basis other than relative sales value provided the methodology was reasonable.
>
> Moreover, we note that Hyundai and LGS used three separate bases of allocation for different selling expenses, one of which was relative sales value. In addition, Hyundai used manpower hours in allocating labor expenses and the number of invoices in allocating accounting department expenses. LGS used a similar methodology to allocate its indirect selling expenses that were not identified by subdivision. We believe that it is more appropriate to allocate human resource and accounting department expenses on the basis of manpower and number of invoices than on the basis of sales value because human resource is a function of the number of employees, and accounting department expense is a function of the volume of invoices prepared. Thus, we believe that these allocation bases are reasonable and have continued to accept them for purposes of these final results of review. Furthermore, we verified HEA['s] and LGS's allocation bases for its [sic] indirect selling expenses during our U.S. sales verifications and found no discrepancies or inaccuracies in Hyundai['s] or LGS's allocation methodology.

Final Results, 61 Fed. Reg. at 20217 (internal citations omitted). From this statement, it is plain that Commerce did not blindly accept LG

Semicon's alternative methodologies. Rather, Commerce explained that the circumstances in this case made it more appropriate to allocate certain indirect selling expenses using methodologies other than sales value.

The Court agrees. While it is true that Commerce typically allocates indirect selling expenses based on sales value, "[Commerce] is given discretion in its choice of methodology as long as the chosen methodology is reasonable and [Commerce's] conclusions are supported by substantial evidence in the record." *Federal-Mogul Corp. v. United States*, 18 CIT 785, 807–08, 862 F. Supp. 384, 405 (1994), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987) (upholding the acceptance of an alternative allocation methodology used to account for indirect selling expenses). As Commerce noted in the *Final Results* and as evidenced by the confidential record, the allocation methodologies offered by LG Semicon are more appropriate. In particular, each alternative allocation methodology bears a direct relation to the manner in which the common expense is incurred. *See* LG Semicon's Section V Resp. (Aug. 29, 1994), C.R. Doc. 14, at 31; LG Semicon's Home Market Verification Report (Apr. 13, 1995), C.R. Doc. 90, at 13. In addition, when Commerce verified LG Semicon's alternative methodologies, it "tested the arithmetic accuracy of the allocation, and found no discrepancies." *See id.*; *see also INA Walzlager Schaeffler KG v. United States*, 21 CIT ___, ___, 957 F. Supp. 251, 275 (1997) (upholding the reporting of indirect selling expenses where Commerce verified the accuracy of the reporting and where there was no indication that the verification was deficient or incomplete). The Court has reviewed the alternative methodologies in the confidential record and finds them reasonable in light of the nature of the common expenses at issue.

Accordingly, because Commerce's decision to accept LG Semicon's indirect expenses was reasonable and properly verified, the Court sustains the determination as supported by substantial evidence and in accordance with law.

D. *Adjustment for Loan Guarantee Fees*

Micron next claims that Commerce failed to account for all the costs associated with LG Semicon's loan guarantees. In particular, Micron argues that in the absence of loan guarantee fees paid by LG Semicon, Commerce should have imputed expenses for hypothetical costs associated with the loans. Micron contends this error was not excused by the fact that under Korean law, a guarantor is not required to charge a fee for related company guarantees unless there is a default. By allowing LG Semicon to report its costs in accordance with the Korean law at issue, Micron maintains that Commerce erroneously elevated a "dubious" foreign law over the strictures of U.S. antidumping law. Pl.'s Br. In Supp. of Mot. for J. on Agency R., at 29.

The Court does not agree. First, Commerce extensively verified LG Semicon's financial expenses and determined that LG Semicon made no payments with respect to loan guarantees. *See Final Results*, 61 Fed. Reg. at 20218; Lg Semicon's Home Market Verification Report (Apr. 13,

1995), C.R. Doc. 90, at 18. And, as Micron noted, Commerce found that Korean law does not require the guarantor of a loan to charge a fee for related party guarantees unless there is a default. *Id.* Commerce also verified that LG Semicon complied with the Korean law in reporting its loan guarantees. *Id.* Commerce's decision is therefore supported by substantial evidence.

Second, the notion that Commerce should reject LG Semicon's reporting because the Korean law is at odds with U.S. antidumping law is without merit. In this instance, there is no evidence to suggest that LG Semicon actually incurred expenses for the loan fees or would have incurred such expenses were it not for the law. As Commerce points out, without some evidence that actual expenses were incurred or even might have been incurred, Micron's request to impute costs for loan fees is entirely too speculative and is therefore unreasonable. *Cf. Koenig & Bauer-Albert AG v. United States*, 22 CIT ____, ____, 15 F. Supp.2d 834, 848 (1998) (noting that the fundamental purpose of the antidumping statute is to ensure the accurate calculation of dumping margins, and in pursuing this goal, Commerce has the discretion to reject information that does not reflect actual costs). Commerce's decision to accept the reporting of the loan guarantee data is therefore not at odds with the antidumping law.

Accordingly, the Court finds that Commerce's accounting of the costs associated with loan guarantees was supported by substantial evidence and otherwise in accordance with law.

E. *Adjustment to U.S. Price for Trading Company Expenses*

Finally, Micron claims that Commerce ignored the role that a U.S. trading company played in processing sales for LG Semicon. Micron maintains that Commerce must account for the trading company's role by making a deduction to U.S. price for expenses LG Semicon incurred as a result of the relationship. Again, Micron's claim is without merit.

At the administrative level, Commerce addressed Micron's concerns in the following passage:

> **DOC Position:** We [] examined LGS's relationship with its trading company. *See* LGS Home Market Sales Verification Report, pp. 18–19. We verified that LGS did not incur costs for the use of its trading company's name. Moreover, we verified that this trading company did not provide any services to sales of subject merchandise to LGS.

Final Results, 61 Fed. Reg. at 20218. Micron does not contest the veracity of the verification report on this issue. Instead, Micron essentially insists that, notwithstanding verification, the trading company played a more integral role in the U.S. sales process than LG Semicon acknowledges, and it is therefore inconceivable that LG Semicon did not incur additional costs relating to the relationship. The record again belies Micron's assertion.

At verification, Commerce and LG Semicon engaged in an extensive dialogue pertaining to the role of the trading company, and Commerce

verified the nature of this stated relationship. *See* LG Semicon's Home Market Verification Report (Apr. 13, 1995), C.R. Doc. 90, at 18–19. In addition, Commerce verified that LG Semicon incurred no costs for the use of the trading company's name and that the trading company provided no services related to the sale of subject merchandise. *Id.* In view of this uncontroverted and exhaustive record, it is unclear what more Micron would have Commerce verify. Accordingly, the Court finds that Commerce's decision on this issue is supported by substantial evidence.

IV.

CONCLUSION

For the foregoing reasons, the Court remands the *Final Results* to Commerce to clarify its position with regard to calculation of R&D expenses, and sustains the Final Results in all other respects. A separate Order will be entered accordingly.

(Slip Op. 99–13)

JEFFREY S. BELL, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 92–11–00764

(Dated January 29, 1999)

JUDGMENT ORDER

GOLDBERG, *Judge:* On November 12, 1993, the Court remanded the above-captioned action to Customs so that plaintiff might present additional evidence pertaining to the denial of his application for a customs broker license. *See Jeffrey S. Bell v. United States*, 17 CIT 1220 (1993). On May 3, 1994, upon Order of the Court, the parties then advised that the Secretary of the Treasury had granted Mr. Bell's appeal of the denial of his license application and that the parties intended to file a stipulation to dismiss the above-captioned action pursuant to USCIT R. 41(a)(1)(B).

Having subsequently failed to submit any papers whatsoever, the Court issued an Order on December 7, 1998, requiring that plaintiff in the above-captioned action show cause why the case should not be dismissed for lack of prosecution. Plaintiff failed to respond to the Court's show cause Order. Defendant responded in a letter to the Court on January 20, 1998, indicating that it had been unable to locate counsel for plaintiff. Upon consideration of plaintiff's failure to respond to the Order to show cause; upon all other papers and proceedings had herein, and upon due deliberation, it is hereby

ORDERED that above-captioned action is dismissed for failure to prosecute.

(Slip Op. 99–14)

NOVUS INTERNATIONAL, INC., DEGUSSA CORP., AND RHONE-POULENC ANIMAL NUTRITION, PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 99–01–00007

(Dated January 27, 1999)

CARMAN, *Chief Judge:* Upon consideration of the consent motion for a voluntary remand, it is hereby

ORDERED that the case is remanded to the Department of commerce for reconsideration of the *Final Results of Expedited Sunset Review on Synthetic Methionine from Japan*, 63 Fed. Reg. 67665 (Dec. 8, 1998); and it is further

ORDERED that, upon remand, Commerce consider the 48 percent rate from the Treasury Department's less-than-fair value investigation of synthetic methionine from Japan as a possible appropriate indicator of the magnitude of dumping that would prevail were the dumping finding on synthetic methionine from Japan to be revoked.

(Slip Op. 99–15)

ABRAHAM SHIEPE, CUSTOMS BROKER LICENSEHOLDER NO. 7114, PLAINTIFF, *v.* UNITED STATES, COMMISSIONER OF CUSTOMS AND SECRETARY OF THE TREASURY, DEFENDANTS

Court No. 96–12–02866

[Plaintiff's Motion for Summary Judgment on the Administrative Record is denied.]

(Decided February 4, 1999)

Grunfeld, Desiderio, Lebowitz & Silverman, LLP (Steven P. Florsheim), for Plaintiff.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Field Office; *Mikki Graves Walser*, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Paul Wilson*, Associate Chief Counsel, Office of Associate Chief Counsel, United States Customs Service, for Defendant.

OPINION

I

INTRODUCTION

WALLACH, *Judge:* Plaintiff Abraham L. Shiepe ("Shiepe") contests the decision of the Secretary of the Treasury ("Secretary") to revoke his customs broker's license. He contends that the alleged misconduct that resulted in the revocation of his license was due to confusion about the

procedure for filing corporate documents with the California Secretary of State and U.S. Customs Service ("Customs") and that the revocation of his license is fundamentally unfair. He has moved for Summary Judgment on the Administrative Record pursuant to USCIT R. 56.1. For the reasons which follow, his Motion is denied, and the revocation is affirmed.

II

Relevant Facts

In 1988, Modawest International Inc. ("Modawest"), a California corporation, decided to engage in importing. *See* Direct Examination of Coligny Couderc on 7/27/95 ("Examination of C. Couderc"), at Court Record ("C.R.") 808–09; Cross-Examination of Deborah McAllister Scott on 7/26/95 ("Cross-Examination of Scott"), at C.R. 563–64; Memorandum signed by Michelle Couderc, Vice-President and Secretary, of 8/15/88 ("Memorandum signed by M. Couderc of 8/15/88"), Shiepe Exh. 26, at C.R. 939. To do so, Modawest needed an officer who was a licensed broker. *See* 19 C.F.R. § 111.11(c)(2) (1992); Direct Examination of Caroll Marie Daunis on 7/25/95 ("Examination of Daunis"), at C.R. 105; Examination of C. Couderc, at C.R. 809. As a result, on August 15, 1988, the Board of Directors of Modawest elected Shiepe, a licensed broker, an officer of the corporation. Memorandum signed by M. Couderc of 8/15/88, Shiepe Exh. 26, at C.R. 939; Direct Examination of Shiepe on 7/27/95 ("Examination of Shiepe"), at C.R. 624–27; Examination of C. Couderc, at C.R. 809. From that point on, Shiepe supervised Modawest's import business. Direct Examination of Michelle Couderc on 7/26/95, at C.R. 491–92.

On December 2, 1988, Shiepe signed and filed an application on behalf of Modawest for a customs broker's license. *See* Application for Customhouse Broker's License of 12/2/88, Shiepe Exh. 23, at C.R. 934–35. On August 11, 1989, Customs informed Shiepe that Modawest's application was unacceptable because the corporation's Articles of Incorporation failed to state that Modawest was "empowered * * * to transact Customs brokerage business" as required by 19 C.F.R. § 111.11(c)(1). Memorandum from Janiszewski, Chief, Broker Compliance and Evaluation Branch to District Director, Los Angles, CA, of 8/11/89 ("Memorandum from Janiszewski of 8/11/89"), Agency Exh. 2/16, at C.R. 960. Later that month, under Shiepe's supervision, Modawest sent Customs a Certificate of Amendment ("Amendment") to its Articles of Incorporation with the language Customs required. *See* Facsimile from Tammons, Broker Compliance, Los Angeles, CA, to Rosenthal, Headquarters, Broker Compliance, of 8/24/89 and Amendment of 8/21/89, Agency Exhs. 16/1–16/2, at C.R. 1124–5; Examination of Shiepe, at C.R. 699–701.

The corporation number assigned to Modawest by the California Secretary of State was noted at the top right hand corner of the Amendment. *See* Amendment of 8/21/89, Agency Exh. 16/2, at C.R. 1125. The Amendment, however, had not been accepted by the California Secretary of State. Amendment of 8/21/89 with handwritten notes, Shiepe

Exh. 2, at C.R. 876; Direct Examination of Deborah McAllister Scott on 7/26/95, at C.R. 528–30. When it was submitted to Customs, there was no cover letter accompanying the document or any other explanatory paper that disclosed that the Amendment had not been properly filed. *See* Decision and Order of the Administrative Law Judge, at C.R. 53 (citing Examination of Shiepe, at C.R. 696).

On September 11, 1989, Customs, unaware of the delayed clearance of the Amendment by the California Secretary of State, issued Modawest a customhouse broker's licence. *See* License For Customhouse Broker, Agency Exh. 2/9, at C.R. 953; Examination of Shiepe, at C.R. 699–700, 702. In June 1990, a Customs inspector discovered Modawest's Articles of Incorporation had never been filed in California. Examination of Daunis, at C.R. 185, 239. On February 11, 1991, the California Secretary of State confirmed that no Amendment to the Articles of Incorporation had been filed. *See* Certification from March Fong Eu, Secretary of State of State of California, of 2/11/91, Agency Exh. 2/18, at C.R. 962; Examination of Daunis, at C.R. 238–40. Therefore, until Customs investigated the matter, the agency was led to believe that the Amendment to Modawest's Articles of Incorporation submitted by Plaintiff on August 23, 1989 was a true copy of a valid corporate Amendment.

After Modawest was licensed, Shiepe decided to form Modawest Custom House Broker, Inc. ("MCHB"), a separate corporation that would only conduct customs business. Examination of Shiepe, at C.R. 662. On April 13, 1990, Shiepe submitted to Customs copies of an application requesting a name change, MCHB's Articles of Incorporation, and an unfiled Amendment to MCHB's Articles of Incorporation noting that the purpose of the corporation was, *inter alia*, "TO TRANSACT CUSTOMS BROKERAGE BUSINESS."[1] Letter from Shiepe to Broker Compliance, U.S. Customs Service, of 4/13/90 with attachments, Agency Exhs. 2/19–2/26, at C.R. 963–970; Examination of Daunis, at C.R. 106.

Shiepe's cover letter and the attached application sought a corporate name change from Modawest to MCHB. Examination of Daunis, at C.R. 110–111. Shiepe, however, never submitted an authorization from the California Secretary of State to change Modawest's name, as required by Customs' regulations. *See* 19 C.F.R. § 111.12(a) (1992) ("If the applicant proposes to operate under a trade or fictitious name in one or more States within the [Customs' district in which the applicant intends to do business], evidence of the applicant's authority to use the name in each such State must accompany the application.").

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[1] Shiepe also submitted a certificate from the California Secretary of State dated March 30, 1990 attaching a copy of MCHB's Articles of Incorporation dated November 10, 1989 that were filed with the California Secretary of State on March 23, 1990 and an Amendment dated March 5, 1990. Certification from March Fong Eu, Secretary of State of State of California, of 3/30/90 with attachments, Agency Exh. 2/22, at C.R. 966–70. The stated purpose of MCHB in the Articles of Incorporation was "to engage in any lawful act or activity for which a corporation may be organized under the General Corporation Law of California * * *." *Id.* at C.R. 967. This document was signed, *inter alia*, by Shiepe as a Director of the corporation. *Id.* at C.R. 968–69. The Amendment dated March 5, 1990, several days before the filing of the Articles of Incorporation, amended the purpose of the corporation to read: "TO TRANSACT CUSTOMS BROKERAGE BUSINESS." MCHB Amendment, Agency Exh. 2/26, at C.R. 970. This document was signed, *inter alia*, by Shiepe as Treasurer. *Id.*

Shiepe frequently called Customs to check on the status of the application for a name change and assured the Supervisory Customs Entry Inspector ("Entry Inspector") who received the application that the Chief of the Broker Compliance and Evaluation Branch had reviewed the documents and approved the application. *See* Examination of Daunis, at C.R. 100–02, 105–06, 121–22; Memorandum from Janiszewski of 8/11/89, Agency Exh. 2/16, at C.R. 960. Shiepe requested that the Entry Inspector give her approval over the telephone, but she refused. Examination of Daunis, at C.R. 122. Instead, on May 23, 1990, the Entry Inspector drafted a memorandum, signed by an Assistant District Director, that informed Customs' Headquarters that Modawest's name was being changed to MCHB, forwarded copies of a filing believed to have been approved by the California Secretary of State and requested the issuance of a license under the name of MCHB. *See id.* at C.R. 122–23; Memorandum from Rasmussen, Assistant District Director, Entry Division, Los Angeles District, to Director, Entry Procedures and Penalties Division, Chief, Entry Licensing & Restricted Merchandise Branch, U.S. Customs Service, Washington, DC, of 5/23/90, Agency Exh. 18, at C.R. 1135. The Entry Supervisor testified that "[she] took the application that Mr. Shipe submitted, and in good faith, [she] just forwarded the application, as he said, to headquarters for them to review." *See* Examination of Daunis, at C.R. 122.

Soon after receiving the Assistant District Director's Memorandum, the Acting Division Director reviewed MCHB's Articles of Incorporation. Memorandum from Worley, Acting Director, Field Operations Division, to Assistant District Director, Entry Division, Los Angeles, CA, of 5/31/90, Agency Exh. 19, at C.R. 1136. He concluded that MCHB was a new corporation requiring a formal application for a broker's license. *Id.*

As a result, by letter dated June 15, 1990, Customs advised Shiepe that (1) based upon a review of the MCHB Articles of Incorporation, it appeared a new corporation was formed and, therefore, a new corporate application was required, (2) MCHB's Articles of Incorporation did not specifically authorize the corporation to conduct Customs brokerage business, and (3) since MCHB did not exist until March 23, 1990, the date of the California Secretary of State's "filed" stamp, then the unfiled Amendment dated March 5, 1990 was invalid and a new Amendment authorizing MCHB to engage in Customs brokerage business was needed. Letter from Trotter, Acting District Director, to Shiepe, of 6/15/90 ("Letter from Trotter of 6/15/90"), Agency Exh. 2/27–2/29, at C.R. 971–73.

On June 20, 1990, Shiepe informed Customs that he had already submitted a "duplicate certificate of amendment to Sacremento requesting an 'original' stamp on it" and "[u]pon receipt of the certificate of amendment (duplicate)" he would immediately forward it to the agency. Letter from Shiepe to Broker Compliance, U.S. Customs Services, of 6/20/90 ("Letter from Shiepe of 6/20/90"), Agency Exh. 2/30, at C.R. 974. Shiepe asked Customs to process MCHB's application while he obtained the stamped copy of the Amendment from the California Secretary of State.

Id. Shiepe did not acknowledge Customs' notice that the March 5, 1990 Amendment was invalid. *Id.*

Shiepe did not send an Amendment dated March 5, 1990 to the California Secretary of State, as he represented to Customs. *See* Cross-Examination of Scott, at C.R. 584; Affidavit of Elissa A. Brown, Agency Exh. 27/2–27/3, at C.R. 1143–44; Decision and Order of the Administrative Law Judge, at C.R. 57. Rather, he provided the Secretary of State with an Amendment dated June 18, 1990.[2] Decision and Order of the Administrative Law Judge, at C.R. 57; Amendment of 6/18/90, Shiepe Exh. 6, at C.R. 885.

On July 13, 1990, Customs returned MCHB's application to Shiepe because it did not contain the information set forth in Customs' June 15, 1990 letter, including an Amendment that expressly authorized the corporation to engage in customs brokerage services. *See* Letter from Rasmussen, Assistant District Director, Entry Division, to Shiepe of 7/13/90 ("Letter from Rasmussen of 7/13/90"), Agency Exhs. 15/1–15/2, at C.R. 1120–21.

On July 31, 1990, the California Secretary of State returned the June 18, 1990 Amendment because the changes to the "purpose" clause did not conform to the requirements of the California Corporations Code. Letter from Chandler, Corporation Documents Examiner, to Modawest of 7/31/90 ("Letter from Chandler of 7/31/90"), Shiepe Exh. 9, at C.R. 888. As a result, Shiepe then submitted an Amendment dated August 8, 1990 to the California Secretary of State.[3] Letter from Chandler of 7/31/90 with note enclosing corrected amendment and Amendment of 8/8/90, Shiepe Exh. 9, at C.R. 888 and 890. On August 16, 1990, the California Secretary of State returned the Amendment because the "purpose" clause had been amended improperly. Letter from Glenn, Corporation Documents Examiner to Modawest, Shiepe Exh. 10, at C.R. 895.

On September 11, 1990, in response to Customs' July 13, 1990 letter, Shiepe provided Customs with, *inter alia*, the June 20, 1990 license application with modifications,[4] a certification from the California Secretary of State dated September 4, 1990 that reflected that an Amendment to MCHB's Articles of Incorporation dated August 23, 1990 [5] had been endorsed and filed on August 24, 1990, and a letter of resignation from

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[2] This document was signed, *inter alia*, by Shiepe as Treasurer. Amendment of 6/18/90, Shiepe Exh. 6, at C.R. 885.

[3] This document was signed, *inter alia*, by Shiepe as Treasurer. Amendment of 8/8/90, Shiepe Exh. 9, at C.R. 890.

[4] At first, Shiepe testified that the June 20th application was thrown in the trash. Examination of Shiepe, at C.R. 675–76. However, when confronted with the fact that there were two applications bearing the same date, the Honorable Richard L. Sippel (the "Administrative Law Judge") notes that Shiepe "quickly changed his story * * *." Decision and Order of the Administrative Law Judge, at C.R. 58, n.12. Shiepe testified that "[t]his wasn't the one that was thrown in the trash. It is the same one; we just added [the language in item 17] on and sent it in * * *. Same signature, that's correct." Examination of Shiepe, at C.R. 677. Item 17 reflects Modawest as a previous applicant for a Customhouse Broker's License that is "[c]urrently in business." Application for Customhouse Broker's License of 6/20/90, Agency Exh. 2/40–2/41, at C.R. 987–88. The Administrative Law Judge concluded that "[t]his is yet another example of [Shiepe's] tendency to mangle the facts." Decision and Order of the Administrative Law Judge, at C.R. 58, n.12.

[5] This document was signed, *inter alia*, by Shiepe as President. Amendment of 8/23/90, Agency Exhibit 2/32, at C.R. 977. MCHB's stated purpose in the August 23, 1990 Amendment was "to engage in the transaction of customs brokerage business." *Id.*

the Vice President of MCHB dated June 19, 1990.[6] *See* Certification from March Fong Eu, Secretary of State of State of California, of 9/4/90 with attachment, Agency Exh. 2/31–2/32, at C.R. 976–77; Letter from Shiepe to Broker Compliance, U.S. Customs Services, of 9/11/90 with attachments, Agency Exhs. 2/37–2/41, at C.R. 984–989. It should be noted that the Amendment dated August 23, 1990 falsely represented that Michelle Couderc was an officer of MCHB at that time.[7] *See* Amendment of 8/23/90, Agency Exhibit 2/32, at C.R. 977; Letter of Resignation from Michelle Couderc of 6/19/90, Shiepe Exh. 7, at C.R. 886; Letter of Resignation from Michelle Couderc of 6/29/90, Shiepe Exh. 8, at C.R. 887.

On July 24, 1992, following an investigation of the customs broker's license application submitted by MCHB, the Commissioner of Customs authorized the Los Angeles District Director (the "Director") to institute revocation proceedings against Shiepe. Stipulation of 7/26/95, Agency Exh. 33, at C.R. 1194–95; Letter from Hallett, Commissioner of Customs, to Heinrich, District Director, U.S. Customs Service, of 7/24/92, Agency Exh. 11, at C.R. 1113. On July 30, 1992, the Director issued a Notice of Preliminary Proceedings and a Proposed Notice to Show Cause and Statement of Charges. Notice and Proposed Notice, Agency Exh. 10, at C.R. 1107–12. On September 11, 1992, Shiepe responded to the proposed charges. Response to Notice to Show Cause, Agency Exh. 9, at C.R. 1090–1106. On August 11, 1994, Customs issued an Amended Notice of Preliminary Proceedings and an Amended Proposed Notice to Show Cause And Statement of Charges. Amended Notice and Proposed Notice, Agency Exh. 7/1–7/6, at C.R. 1047–1052. A Preliminary Proceeding was held on February 7, 1995. Memorandum In Support Of Defendant's Response In Opposition To Plaintiff's Motion For Summary Judgment On The Administrative Record at 3.

On June 29, 1995, the Director issued a Notice to Show Cause And Statement of Charges and a Notice of Revocation Proceedings.[8] Notices, at C.R. 1341, 1345–48, 1342–43. Shiepe was charged with violating (1) 19 C.F.R. § 111.11, requiring that an association or corporation be empowered under its articles of incorporation to transact customs brokerage business, (2) 19 C.F.R. § 111.28(a), requiring every licensed officer of a licensed corporate broker to exercise responsible supervision and control over the transaction of the corporation's customs business, (3) 19 C.F.R. § 111.32, prohibiting a broker from filing, procuring or as-

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[6] The Administrative Law Judge concluded that based upon the chronology of events the certified copy of MCHB's Articles of Incorporation and the Vice President's resignation letter were probably forwarded to Customs with Shiepe's September 11, 1990 letter. Decision and Order of the Administrative Law Judge, at C.R. 58.

[7] In her resignation letter dated June 29, 1990, Michelle Couderc notified MCHB's Board of Directors that she was resigning her position as Vice President of MCHB but would remain as the Secretary for the Board of Directors. Letter of Resignation from Michelle Couderc of 6/29/90, Shiepe Exh. 8, at C.R. 887. Remaining as the Secretary for the Board of Directors is not equivalent to serving as an officer of the corporation or, in this case, as Secretary of MCHB, as represented in the Amendment dated August 23, 1990. *See* Amendment of 8/23/90, Agency Exhibit 2/32, at C.R. 977. Under California law, a corporate officer must be chosen by a corporation's Board of Directors. Cal. Corp. Code § 312(b) (West 1998). There is no evidence in the record that Michelle Couderc was serving her tenure as elected Secretary to MCHB at the time she signed the above-referenced Amendment.

[8] The action against Modawest was dismissed pursuant to a settlement agreement. Discussion Between the Administrative Law Judge and Counsel on 7/25/95, at C.R. 85–87; Letter from Weise, Commissioner of Customs, to Heinrich, District Director, U.S. Customs Service, Agency Exh. 28, at C.R. 1152.

sisting in the filing of any claim, or of any document, affidavit, or other papers, known by such broker to be false and knowingly giving, soliciting or procuring the giving of any false or misleading information in matters pending before the Treasury Department or any representatives thereof, (4) 19 C.F.R. § 111.53, providing for revocation of a license if the broker has, *inter alia*, (a) made or caused to be made in any application for any license or permit under this part, or report filed with Customs, any statement which was at the time and in light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any application or report any material fact which was required and/or (c) violated any provision of any law enforced by Customs or the rules or regulations issued under any such provision, and (5) 19 C.F.R. § 111.94, requiring payment of an assessed broker's penalty within 60 days of the date of a final determination that the broker is liable for a monetary penalty. *Id.* at C.R. 1341,1345–1348.

On July 25–27, 1995, the Administrative Law Judge conducted a revocation hearing pursuant to 19 U.S.C. § 1641(d)(2)(B) (1988) and 19 C.F.R. § 111.67 (1992). The Administrative Law Judge found that Customs had introduced a "preponderance of substantial and reliable evidence" to support all of the charges against Shiepe, with the exception of the charge that Shiepe had failed to pay a broker's penalty in violation of 19 C.F.R. § 111.94. Decision and Order of the Administrative Law Judge, at C.R. 80–81.

On October 28, 1996, the Department of the Treasury adopted the Administrative Law Judge's recommended Decision and Order to revoke Shiepe's customs broker's license. Memorandum from Simpson, Deputy Assistant Secretary (Regulatory, Tariff & Trade Enforcement), to Weise, Commissioner of Customs, of 10/28/96 ("Memorandum from Simpson of 10/28/96"), at C.R. 46–49. On December 26, 1996, Shiepe filed a Complaint contesting the revocation of his license. On March 3, 1997, Defendant filed an Answer. On December 12, 1997, Shiepe filed a Motion for Summary Judgment on the Administrative Record* ("USCIT R. 56.1 Motion") challenging the revocation of his license.

III

JURISDICTION AND STANDARD OF REVIEW

Pursuant to 28 U.S.C. § 1581(g)(2) (1988), this Court has exclusive jurisdiction to review any decision of the Secretary to revoke a customs broker's license under § 641(d)(2)(B) of the Tariff Act of 1930, 19 U.S.C. § 1641(d)(2)(B) (1988). *See also* 19 U.S.C. § 1641(e)(1) (1988) (governing appeals to the U.S. Court of International Trade).

In a case commenced under 19 U.S.C. § 1641(d)(2)(B) (1988), "[t]he findings of the Secretary as to the facts, if supported by substantial evidence, shall be conclusive." 19 U.S.C. § 1641(e)(3) (1988).

* Plaintiff incorrectly identified his USCIT R. 56.1 "Motion for Summary Judgment on the Administrative Record." Since the Motion was filed pursuant to USCIT R. 56.1 rather than USCIT R. 56, the Court treats Plaintiff's Motion for Judgment Upon the Administrative Record rather than a Motion for Summary Judgment.

Additionally, 28 U.S.C. §§ 2640(a)(5) and (d) (1988) direct that this Court review the Secretary's decision to revoke a broker's license under 19 U.S.C. § 1641(d)(2)(B) (1988) as provided in 5 U.S.C. § 706 (1988).

Pursuant to 5 U.S.C. § 706(2)(E) (1988),

> [t]he reviewing court shall * * * hold unlawful and set aside agency action, findings, and conclusions found to be * * * unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provide by statute * * *.

"Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). "The Court may not substitute its judgment for that of the administrative agency," and "the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's finding from being supported by substantial evidence." *Barnhart v. United States Treasury Dep't*, 9 CIT 287, 290, 613 F. Supp. 370, 373 (1985).

Additionally, pursuant to 5 U.S.C. § 706(2)(A) (1988),

> [t]he reviewing court shall * * * hold unlawful and set aside agency action, findings, and conclusions found to be * * * arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law * * *.

Therefore, "[i]n reviewing the Secretary's findings as to legal issues, the Court will review whether the Secretary's decision to revoke [a] license constitutes an abuse of discretion." *Urbano v. United States*, 967 F. Supp. 1322, 1329 (CIT 1997), *aff'd*, 146 F.3d 1346 (Fed. Cir. 1998). Specifically,

> [a]fter satisfying itself [sic] the agency has acted within its statutory authority and the action was accompanied by appropriate procedural protections and supported by substantial evidence, the Court must inquire whether the rationale of the agency is both discernible and defensible. In so doing, the Court may not substitute its judgment for that of the agency, but need only assure itself the decision was rational and based on consideration of relevant factors.

Barnhart, 9 CIT at 290–91, 613 F. Supp. at 374. Under this standard,

> [w]hen the penalty chosen by an agency is within the range of sanctions provided by applicable disciplinary regulations, the severity of the sanction imposed is within the discretion of the agency. Further, the imposition of a sanction within the authority of an administrative agency is not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases.

Id. at 291, 613 F. Supp. at 374 (quoting *Temp Trucking and Transfer Corp. v. Dickson*, 405 F. Supp. 506, 514 (1975)) (citations omitted).

The Court reviews a license revocation case based on the whole record before it or those parts cited by a party and takes due account of the rule of prejudicial error. *See* 5 U.S.C. § 706 (1988).

IV

DISCUSSION

In essence, Shiepe contends that the actions that resulted in the revocation of his license were due to confusion about the procedure for filing corporate documents with the California Secretary of State and Customs and that the revocation of his license is fundamentally unfair.[9] Shiepe provides no citations to the administrative record or legal authority to support his contentions. The Court has no obligation to search the record or provide legal research when counsel provides no citations.

The Secretary's decision to revoke Shiepe's customs broker's license was predicated upon the results of an adjudicatory hearing that conformed with 5 U.S.C. § 557 (1988) and was required under 19 U.S.C. § 1641(d)(2)(B) (1988). *See* Letter from Zarate, Attorney-Advisor, Office of the Assistant General Counsel (Enforcement), Department of the Treasury, to Halley, Assistant Regional Counsel, of 7/12/96, at C.R. 44; Decision and Order of the Administrative Law Judge, at C.R. 51. Therefore, this Court will hold the agency's decision unlawful and set it aside if it is unsupported by substantial evidence.

Upon its review of the record, the Court concludes that substantial evidence supports the Administrative Law Judge's conclusions that

> Shiepe, as a licensed Customs broker and as a corporate officer, was at all times in control of and had the duty to supervise activities of persons affiliated with Modawest and MCHB with respect to their contacts with [Customs]. Shiepe was responsible for the conduct of Customs business by Modawest without it first being properly empowered under its articles of incorporation and for the wrongful issuance of a Customs broker license. Shiepe was responsible for the intentional submission to [Customs] of a corporate amendment for Modawest which falsely represented that the amendment had been filed with and accepted by the California Secretary of State. Shiepe was responsible for the intentional submission to [Customs] of a request for a name change from Modawest to MCHB which was in fact

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[9] Shiepe also argues that Customs should not have required him to file an Amendment to Modawest's Articles of Incorporation explicitly specifying that the corporation had the authority to engage in customs business because Customs was imposing a requirement not set forth under Customs regulation 19 C.F.R. § 111.11 (c)(1) nor under California corporate law. *See* Memorandum In Support Of Plaintiff's Motion For Summary Judgment at 2–3.

Shiepe's argument fails for two reasons. First, the Court finds that Customs' interpretation of its regulation is not unreasonable. The agency set forth its interpretation of 19 C.F.R. § 111.11 (c)(1) in an inter-agency memorandum. *See* Memorandum from Chief, Entry Rulings Branch, to Director, Field Operations Division, of 7/17/89, Shiepe Exh. 1, at C.R. 873–75. Because the agency's interpretation was provided through an inter-agency memorandum rather than the notice and comment procedures associated with an agency rule-making, the agency's analysis is an interpretative rule. *See Timken Co. v. United States*, 11 CIT 786, 805–06, 673 F. Supp. 495, 514 (1987) (citing *Cabais v. Egger*, 690 F.2d 234, 238 (D.C. Cir. 1982) (quoting *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C. Cir. 1952) (An interpretative rule is "'[a statement] as to what the administrative officer thinks the statute or regulation means.'")). "Unlike legislative rules, which have the force of law if reasonable and validly promulgated, interpretative rules do not bind a court and a court is free to substitute its judgment for the agency's, although it may defer to the agency's interpretation." *Id.* at 806, 673 F. Supp. at 514. In this case, the agency's interpretation that 19 C.F.R. § 111.11(c)(1) requires articles of incorporation to specifically state that the corporation is empowered to transact customs brokerage business and trumps contrary state law is reasonable. Therefore, the court defers to the agency.

Second, Shiepe was informed of this requirement in writing but, at the time, did not raise a legal objection. *See* Memorandum from Janiszewski of 8/11/89, Agency Exh. 2/16, at C.R. 960; Letter from Trotter of 6/15/90, Agency Exh. 2/27, at C.R. 971; Letter from Rasmussen of 7/13/90, Agency Exhs.15/1–15/2, at C.R. 1120–21. Instead, Shiepe proceeded to abide by the requirement and did so in a false and/or misleading manner. *See* Amendment of 8/21/89, Agency Exh. 16/2, at C.R. 1125; Letter from Shiepe of 6/20/90, Agency Exh. 2/30, at C.R. 974; Examination of Daunis, at C.R. 185, 239; Cross-Examination of Scott, at C.R.584; Examination of Shiepe, at C.R. 699–701; Amendment of 6/18/90, Shiepe Exh. 6, at C.R. 885.

> an application for a Customs broker license for MCHB. Shiepe was grossly negligent in the extreme by failing to submit a proper application for a name change for MCHB. Shiepe intentionally attempted to mislead [Customs] by submitting a false and misleading Amendment for MCHB which predated its articles of incorporation and which failed to disclose that the Amendment repeatedly had not been accepted for filing by the California Secretary of State. In furtherance of his scheme, Shiepe affirmatively and falsely represented to [Customs] that he was seeking a "duplicate" Amendment from California's Secretary of State when in fact there was no original on file with the Secretary of State for which a copy could be obtained. Finally, in furtherance of a scheme to mislead [Customs], Shiepe knowingly submitted an Amendment for MCHB which falsely represented that Michelle Couderc was an officer at a time after she had resigned her position.

Decision and Order of the Administrative Law Judge, at C.R. 80. Therefore, the Administrative Law Judge's findings of facts, adopted by the Secretary, are conclusive.

In addition, the Secretary's decision to revoke Shiepe's license did not constitute an abuse of discretion. Pursuant to 19 U.S.C. § 1641(d) (1988) and 19 C.F.R. §§ 111.53 and 111.91 (1992), Customs may either suspend or revoke a customs broker's license or issue a monetary penalty not to exceed $30,000 for several reasons. These reasons include that a broker has (1) "made or caused to be made in any application for any license or permit * * * or report filed with Customs, any statement which was, at the time and in light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any application or report any material fact which was required," and (2) "violated any provision of any law enforced by Customs or the rules or regulations issued under any such provision." 19 C.F.R. § 111.53(a) and (c) (1992).

The record supports the Administrative Law Judge's finding that Shiepe's actions fell within the above-quoted sections of 19 C.F.R. § 111.53 (1992). Decision and Order of the Administrative Law Judge, at C.R. 61–74. Therefore, it was within the Secretary's discretion to chose which sanction to impose. The Secretary's decision to revoke Shiepe's license was not an abuse of discretion because it was rational and took into account all relevant factors. *See* Memorandum from Simpson of 10/28/96, at C.R. 47–49.

Accordingly, the Secretary's decision to revoke Shiepe's license is affirmed.

V

CONCLUSION

For the reasons set forth above, the Secretary's revocation of Shiepe's license is supported by substantial evidence and does not constitute an abuse of discretion. Plaintiff's USCIT R. 56.1 Motion is denied and the Secretary's revocation of Custom Broker's License No. 7114 issued to Shiepe is affirmed.

(Slip Op. 99–16)

WOLVERINE TUBE (CANADA), INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND HUSSEY COPPER, LTD. ET AL., INTERVENOR-DEFENDANTS

Court No. 98–12–03241

[Plaintiff's application for preliminary injunction denied; action dismissed.]

(Decided February 5, 1999)

Rogers & Wells LLP (Carrie A. Simon and *Ryan Trainer)* for the plaintiff.

David W. Ogden, Acting Assistant Attorney General; *David M. Cohen*, Director, *Velta A. Melnbrencis*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Michele D. Lynch)*; and Office of Chief Counsel for Import Administration, U.S. Department of Commerce *(Linda S. Chang)*, of counsel, for the defendant.

Collier, Shannon, Rill & Scott, PLLC (David A. Hartquist, Jeffrey S. Beckington, Mary T. Staley and *John M. Herrmann)* for the intervenor-defendants.

MEMORANDUM

AQUILINO, *Judge:* The above-named parties agreed during oral argument that this action raises an issue of first impression, namely, whether the Court of International Trade has jurisdiction to enjoin administrative proceedings by the International Trade Administration, U.S. Department of Commerce ("ITA") pending resolution of an appeal to a binational panel constituted under the North American Free Trade Agreement ("NAFTA") that might obviate those proceedings. The court concludes that it has such jurisdiction pursuant to 28 U.S.C § 1581(i), contingent upon a showing by an applicant that judicial review of them in regular course pursuant to 28 U.S.C. §1581(c) would be "manifestly inadequate". *Compare Miller & Co. v. United States*, 824 F.2d 961 (Fed.Cir. 1987), *cert. denied*, 484 U.S. 1041 (1988), *and Hylsa, S.A. de C.V. v. United States*, 21 CIT ___, 960 F.Supp. 320 (1997), *aff'd*, 135 F.3d 778 (Fed.Cir. 1998), *with Techsnabexport, Ltd. v. United States*, 16 CIT 420, 795 F.Supp. 428 (1992), *and Makita Corp. v. United States*, 17 CIT 240, 819 F.Supp. 1099 (1993).

I

The plaintiff commenced this action on the eve of a deadline to supplement the record of an ITA administrative review of *Antidumping Duty Order; Brass Sheet and Strip From Canada*, 52 Fed.Reg. 1,217 (Jan. 12, 1987), for the year 1997. *See* 63 Fed. Reg. 10,002 (Feb. 27, 1998). Among other relief, it seeks to enjoin further agency proceedings with regard to that year

> pending resolution of a motion for remand that * * * Wolverine has filed in a separate NAFTA Appeal contesting the final results of the Department's administrative review of entries of Wolverine products during calendar year 1996 * * * in *Brass Sheet and Strip from Canada*, NAFTA Secretariat File No. USA–CDA 98–1904–03.

According to the complaint, ITA annual reviews of 1994 and 1995 resulted in *de minimis* margins of dumping, and,

> [b]ased on the verified evidence in the 1996 Review, the Department preliminarily found Wolverine to have a *de minimis* dumping

> margin of 0.42%, and decided to revoke Wolverine from the underlying antidumping order. *Brass Sheet and Strip from Canada; Preliminary Results of Antidumping Duty Administrative Review*, 63 Fed.Reg. 64,666 (Dep't Comm. 1997) * * *.

Complaint, para. 10. The plaintiff further avers that the final margin for 1996, 0.67 percent[1], was the direct result of an agency calculation error, which the ITA "has admitted in the NAFTA appeal"[2].

> When the Department corrects its admitted error and reduces Wolverine's dumping margin to a *de minimis* rate, the Department should also logically resolve * * * whether Wolverine should have been revoked from the underlying antidumping order.

Id., para. 9. Furthermore,

> if Wolverine [had] been revoked from the antidumping duty order at the conclusion of the 1996 Review, the Department would have had no legal authority to conduct administrative reviews of post-1996 entries of Wolverine's products. Nevertheless, since revocation did not occur due to the Department's admitted error in the 1996 Review, the Department has proceeded to conduct the 1997 Review, at great expense and substantial burden to Wolverine.
>
> 14. As a result of the Department's admission that the 1996 Review results were flawed, Wolverine on November 2, 1998 filed a motion in the NAFTA Appeal to remand the contested agency decision to the Department to correct its admitted error. Wolverine reasoned that * * * a remand now would be the most legally, procedurally, and pragmatically appropriate course of action. * * *

Id., paras. 13, 14. The complaint also shows that the ITA opposes remand at this time (as do the U.S. petitioners, intervenor-defendants herein) and sets forth plaintiff's (unsuccessful) efforts to get the agency to agree to suspend further proceedings covering 1997. *See id.*, paras. 15, 16.

The court held an immediate conference with all counsel on plaintiff's request for a temporary restraining order, which was denied. A hearing on plaintiff's application for a preliminary injunction was subsequently held in open court pursuant to order to show cause, by which time the company had complied with the ITA's request for supplemental data for 1997.

II

A temporary restraining order or preliminary injunction is an extraordinary remedy which can only be granted upon showing:

> (1) A threat of immediate irreparable harm; (2) that the public interest would be better served by issuing than denying the injunction; (3) a likelihood of success on the merits; and (4) that the balance of hardship on the parties favor[s issuance].

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[1] *See* 63 Fed.Reg. at 33,041.

[2] Complaint, para. 7. *But see* Defendant's Memorandum, pp. 4–6, *and compare with id.*, Appendix, Collective Exhibit 1b, 6th and 10th to 12th pages. *Cf.* Defendant-Intervenors' Opposition to Plaintiff's Motion, pp. 8–9 n. 2.

S.J. Stile Assocs., Ltd. v. Snyder, 68 CCPA 27, 30, C.A.D. 1261, 646 F.2d 522, 525 (1981); *American Stevedoring Inc. v. U.S. Customs Service*, 18 CIT 331, 335, 852 F.Supp. 1067, 1071 (1994). While this and other courts have held that the severity of the injury the moving party will sustain without injunctive relief is in inverse proportion to the showing of likelihood of success on the merits[3], they have also held that failure to bear the burden of persuasion as to any one of these four factors is ground for denial for such remedy. *E.g.*, *Bomont Industries v. United States*, 10 CIT 431, 638 F.Supp. 1334 (1986). *See FMC Corporation v. United States*, 3 F.3d 424, 427 (Fed.Cir. 1993).

Here, none of the four factors favors the plaintiff. While there is no reason to doubt plaintiff's concern about "out-of-pocket expenses" and that "active participation in an antidumping case also places substantial burdens on key administrative staff th[at] are critical to the operations of the company"[4], the court cannot conclude that those expectable costs are the equivalent of "irreparable harm". *Cf.*, *e.g.*, *Sampson v. Murray*, 415 U.S. 61 (1974); *Wisconsin Gas Co. v. Federal Energy Regulatory Comm'n*, 758 F.2d 669 (D.C.Cir. 1985); *Arbor Foods, Inc. v. United States*, 8 CIT 355, 600 F.Supp. 217 (1984).

The public interest, as the plaintiff properly points out, is the "fair and efficient administration of U.S. trade laws, as well as the appearance of such administration in the eyes of all who come within their realm"[5], but the court cannot also concur that requiring Wolverine to continue its compliance with those laws is "patently unfair and inefficient". Plaintiff's Memorandum, p. 28. Indeed, their fair and efficient administration may well soon lead, as the plaintiff believes, to a determination by the ITA to revoke the antidumping-duty order against it. But even if and when the ministerial error at issue in the NAFTA proceedings is corrected, and thereby causes plaintiff's 1996 margin to become *de minimis*, revocation would not be automatic, as the plaintiff seemingly pretends. The statute governing the ITA in this regard, 19 U.S.C. §1675(d)(1), provides that, in general, it "may" revoke an order after an administrative review thereunder. The agency's published regulation is to the same effect. *See* 19 C.F.R. §351.222(b) (1998). This standard, combined with the traditional reluctance of courts to intervene in administrative proceedings before they have run their complete course[6], leaves the likelihood of plaintiffs' success on the merits, at best, debatable. Finally, with respect to the balance of hardships, the intervenor-defendants point out that

> Wolverine itself requested that this review be conducted and has already submitted its original and supplemental questionnaire responses. No additional duties can be imposed on Wolverine's

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[3] *See, e.g., Makita Corp. v. United States*, 17 CIT 240, 250, 819 F.Supp. 1099, 1108 (1993); *Ceramica Regiomontana, S.A. v. United States*, 7 CIT 390, 395, 590 F.Supp. 1260, 1264 (1984); *American Air Parcel Forwarding Co. v. United States*, 1 CIT 293, 300, 515 F.Supp. 47, 53 (1981).

[4] Plaintiff's Memorandum, p. 22.

[5] *Makita Corp. v. United States*, 17 CIT at 250, 819 F.Supp. at 1107.

[6] *See, e.g., Federal Trade Comm'n v. Standard Oil Co. of Calif.*, 449 U.S. 232 (1980), and cases cited therein.

> imports until the final determination is reached. Any hardship imposed on Wolverine, therefore, is minimal. In contrast, a hardship would exist for the Department and the domestic industry if this review were to be stopped and then, at some time in the future, resume. Considerable resources have already been expended by both the Department and the domestic industry in this review. If Wolverine is found to be dumping in this review, delaying the ultimate resolution of this administrative review and the proper imposition of antidumping duties by stopping the 1997 review at this point would be detrimental to the efficient administration of the law and to the interests of the domestic industry.

Defendant-Intervenors' Opposition to Plaintiff's Motion, p. 4. *See generally* Appendix to Defendant's Memorandum, Collective Exhibit 2. Given these circumstances, there is little room for even debate that any hardship(s) tip decidedly in plaintiff's favor.

III

In short, in view of the foregoing, plaintiff's application for a preliminary injunction must be denied. And in failing to sustain its burden for this immediate, extraordinary, equitable relief, the plaintiff has also failed to convince this court that jurisdiction pursuant to 28 U.S.C. §1581(c) would be manifestly inadequate. Ergo, this action should be dismissed.

Judgment will enter accordingly.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C99/1 1/6/99 Tsoucalas, J.	Swire Magnetics	90–10–00499	3926.90.90 through 3926.90.98 Various rates	8522.90.75 Various rates	Technicolor Videocassette, Inc. *v.* U.S., 19 CIT 942 (1995)	Charleston New York, etc. V-O, VHS Cassettes
C99/2 1/8/99 Goldberg, J.	Amko Int'l Trading Inc.	95–6–00767	202.10.00 100% pursuant to 9903.23.17	2103.90.60 or 2103.90.90 7.5%, 7.3%, & 7.1%	Agreed statement of facts	New York Canned tomato sauce preparation
C99/3 1/22/99 Carman, C.J.	Canvas & Leather Bag Co.	94–8–00479	4202.92.45 20%	3924.10.50 3.4%	SGI, Inc. *v.* U.S., 122 F.3d 1468 (Fed. Cir. 1997)	New York Various styles of portable soft-sided insulated cooler bags
C99/4 1/22/99 Carman, C.J.	Canvas & Leather Bag Co.	95–5–00663	4202.92.45, 4202.12.2085, 4202.19.00 20% 4202.92.30, 4202.12.80.70 20%	3924.10.50 3.4% 6307.90.99 7%	SGI, Inc. *v.* U.S., 122 F.3d 1468 (Fed. Cir. 1997)	New York Various styles of portable soft-sided insulated cooler bags
C99/5 1/22/99 Carman, C.J.	Canvas & Leather Bag Co.	95–9–01230	4202.92.45, 4202.12.2085, 4202.19.00 20% 4202.92.30, 4202.12.80.70 20%	3924.10.50 3.4% 6307.90.99 7%	SGI, Inc. *v.* U.S., 122 F.3d 1468 (Fed. Cir. 1997)	New York Various styles of portable soft-sided insulated cooler bags
C99/6 1/22/99 Carman, C.J.	Canvas & Leather Bag Co.	96–1–00273	4202.92.45 20%	3924.10.50 3.4%	SGI, Inc. *v.* U.S., 122 F.3d 1468 (Fed. Cir. 1997)	New York Various styles of portable soft-sided insulated cooler bags
C99/7 1/26/99 Newman, C.J.	Marubeni America Corp.	93–11–00735	7407.10.10 Not stated	7411.10.10 1.5%	Agreed statement of facts	Los Angeles Profiles

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